

D81nles1

## Trial

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 UNITED STATES OF AMERICA,

New York, N.Y.

4 v.

S14 11 Cr. 1091 (VM)

5 PETER LESNIEWSKI, MARIE BARAN  
6 and JOSEPH RUTIGLIANO,

7 Defendants.

8 -----x

9 August 1, 2013  
10 10:10 a.m.

11 Before:

12 HON. VICTOR MARRERO,

13 District Judge

14 APPEARANCES

15 PREET BHARARA

16 United States Attorney for the  
Southern District of New York

17 BY: JUSTIN S. WEDDLE

DANIEL BEN TEHRANI

18 NICOLE WARE FRIEDLANDER

Assistant United States Attorneys

19 LAW OFFICES OF JOSHUA L. DRATEL, P.C.

20 Attorneys for Defendant Peter Lesniewski

21 BY: JOSHUA LEWIS DRATEL

LINDSAY A. LEWIS

22 DURKIN & ROBERTS

Attorneys for Defendant Peter Lesniewski

23 BY: THOMAS ANTHONY DURKIN

D81nles1

Trial

APPEARANCES CONTINUED

KOEHLER & ISAACS, LLP

Attorneys for Defendant Marie Baran

BY: JOEY JACKSON

JOSEPH W. RYAN, JR.

KEVIN MENEILLY

Attorneys for Defendant Joseph Rutigliano

- also present -

Annie Chen

Emma Larson, Government Paralegals

SA Frank LoMonaco, FBI

Yeni Yrizarry, Defendant Baran Paralegal

oOo

D81nles1

## Trial

1  
2 THE COURT: Good morning. Thank you. Be seated.

3 My clerk distributed a revised black-line copy of the  
4 draft instructions yesterday evening.

5 Has the draft been received?

6 MR. DRATEL: Yes, your Honor.

7 MR. WEDDLE: Yes, your Honor.

8 MR. RYAN: Yes, your Honor.

9 MR. JACKSON: Yes, your Honor.

10 THE COURT: As you can see, it's still quite lengthy,  
11 and I am looking for ways of cutting back. One way which I am  
12 going to propose that is that in the sections where we go into  
13 the indictment, I don't think we need to read all of the text  
14 of the indictment and the statutes. It may be better to  
15 summarize that because they are going to have a copy of the  
16 indictment. If we just give them a summary of the relevant  
17 portions and then go straight into the elements, it could save  
18 a lot of time and eliminate the most tedious parts of the  
19 instruction, which is reading straight from the indictment.

20 That is one thought.

21 There are a few other items that, as we go through,  
22 you will probably pick up that I have some further comments on,  
23 but we can get to those as we go through the draft in due  
24 course.

25 I have received from Mr. Ryan a supplemental request

D81nles1

Trial

1 to charge to behalf of Mr. Rutigliano. Has the government  
2 received this?

3 MR. WEDDLE: Yes, your Honor. There have been a  
4 number. I think you are referring to the one that just came  
5 in.

6 THE COURT: The one that came in last night dated July  
7 31, 2013. There had been one the previous day, July 30, in  
8 which Mr. Ryan made four different requests, actually three,  
9 which includes the one he sent last night as a supplement. So  
10 I am not sure, Mr. Ryan, what your intent was with regards to  
11 the other two items that you have put into your --

12 MR. WEDDLE: Your Honor. I'm sorry.

13 THE COURT: -- memo of the previous day.

14 Yes, Mr. Weddle.

15 MR. WEDDLE: I addressed briefly at yesterday's  
16 charging conference Mr. Ryan's July 30 requests, and I think  
17 they basically fell into two categories. He had a lengthy  
18 defense contention request which I thought was not appropriate  
19 since it sounded more like proposed testimony by the defendant  
20 who did not testify, and the second issue was the statute of  
21 limitations issue.

22 The request that Mr. Ryan put in last night, the July  
23 31 one, was also a different version of a statute of  
24 limitations instruction.

25 I think neither one of them is correct. If statute of

D81nles1

## Trial

1 limitations is something that your Honor would like to address  
2 in the charge, and we don't have a problem with it, I think the  
3 proper thing to do is, with respect to the conspiracy charges,  
4 just tell the jury that in order to convict on the conspiracy  
5 charge you must find that an overt act was committed after  
6 December 18, 2006.

7 I think it should say you must find that at least one  
8 overt act was committed after December 18, 2006, and that would  
9 cover it for the conspiracy charges.

10 I don't think Mr. Ryan has submitted something with  
11 respect to the substantive charges, but if he would like some  
12 kind of charge relating to statute of limitations issues on the  
13 substantive charges, we can think of how that should be worded.  
14 I think that would be, again, relatively simple for the wire  
15 fraud charges. You must find at least one wiring in  
16 furtherance of the scheme was made or caused after December 18,  
17 2006, something like that.

18 THE COURT: All right. Thank you.

19 Mr. Ryan.

20 MR. RYAN: Your Honor, the law as I understand it is  
21 that Mr. Rutigliano would have to agree that applications for  
22 disability were filed by others, fellow conspirators within the  
23 five years. It is undisputed here that the two applications  
24 that he was involved with, one occurred in 2003, James Maher,  
25 and the other one in 2005, which is beyond the five-year

D81nles1

## Trial

1 limitation.

2 The only applications that are within the five years  
3 are Regina Walsh and Michael Stavola. The jury would have to  
4 find that Mr. Rutigliano had agreed that the Walsh application  
5 would be filed and the Stavola application would be filed for  
6 him to be liable for their filings.

7 The government's evidence shows on the Walsh filing  
8 that she went to Dr. Ajemian, and Ms. Baran helped her prepare  
9 and file it. There is no evidence that Mr. Rutigliano had  
10 anything to do with it.

11 With respect to Mr. Stavola, he went to Dr. Parisi and  
12 his application was filed with the assistance of Edward Yule.  
13 There is another application. Two applications were filed  
14 within the five years. That was the subject of my Rule 29,  
15 that there is no reasonable basis a rational juror could find  
16 that Mr. Rutigliano caused either one of those applications to  
17 be filed. Having denied that motion, the jury would have to  
18 find that these two applications, Stavola and Walsh, were filed  
19 within five years with Mr. Rutigliano's agreement.

20 The cases I have cited, the Second Circuit case  
21 clearly holds for the proposition that a conspirator is only  
22 liable for something that happened within the five years  
23 pursuant to his agreement.

24 Judge Breyer pointed out in the other case I cited  
25 when he sat on the Third Circuit -- withdrawn, that is not

D81nles1

Trial

1 relevant to this point. It is relevant to another point.

2 So that my suggestion is that your Honor do read to  
3 the jury, you have a section in your charge on limitations  
4 citing the 18 U.S.C. 3282.

5 With respect to conspiracy count the charge should  
6 include our suggested supplemental charge that the Stavola and  
7 Walsh applications were filed pursuant to an agreement with  
8 Mr. Rutigliano.

9 It makes sense. Why should he be liable for something  
10 someone else did unless it was within this agreement? The  
11 evidence here is he had an agreement to help Parlante in '05  
12 and he agreed to help Maher in 2003, ten years ago.

13 So having denied it on sufficiency, I think it's  
14 important that your Honor has a chapter on the limitations  
15 issue for that reason.

16 THE COURT: All right. Thank you.

17 Mr. Weddle, anything else on this issue?

18 MR. WEDDLE: I think it's relatively straightforward,  
19 your Honor. Any act in furtherance of the conspiracy within  
20 the statute of limitations satisfies it. It doesn't have to be  
21 the application that Mr. Ryan is talking about. Among the many  
22 acts in furtherance of the conspiracy is, of course, Joseph  
23 Rutigliano's own continuing disability certification in 2011.  
24 There are other certifications that happened recently. There  
25 are wires, there are repeated payments that each are in

D81nles1

## Trial

1 furtherance of the conspiracy. Every disability payment that  
2 comes through is in furtherance of the conspiracy. There are  
3 innumerable acts in furtherance of the conspiracy.

4 There are some acts in furtherance of the conspiracy  
5 that also predate December 2006. But the conspiracy continued  
6 and is presumed to continue because there was no withdrawal by  
7 anybody.

8 MR. RYAN: Your Honor, now Justice Breyer's opinion is  
9 relevant, because Mr. Weddle is telling your Honor that because  
10 Mr. Rutigliano filed a continuing disability report in which he  
11 allegedly falsely stated he was not self-employed. It cannot  
12 be found in furtherance of the conspiracy, because this  
13 conspiracy was to get approval from the Railroad Retirement  
14 Board for the annuity. Once that happened, the object of the  
15 conspiracy was completed.

16 It has nothing to do with the March '11 CDR, which is  
17 the subject now, I think it's Count 21, that has nothing to do  
18 with getting money from the RRB which is the objective of the  
19 conspiracy. As Justice Breyer points out, that when that  
20 objective is completed, the subsequent act is not in  
21 furtherance of the conspiracy.

22 So there's really no relationship between the March  
23 2011 CDR with respect to the application that Mr. Rutigliano  
24 filed for himself to get the approval in 2000. April of 2000  
25 he got the approval.



D81nles1

## Trial

1 THE COURT: All right. Thank you.

2 We'll have a provision that deals with the statute of  
3 limitations issues, and we'll consider how to reflect the  
4 various positions.

5 With that can we then turn to the draft that was  
6 circulated and, again, go over global comments and then turn to  
7 specific page-by-page edits.

8 Mr. Weddle.

9 MR. WEDDLE: Thank you, your Honor.

10 One thing that I noticed is missing, and it's probably  
11 my fault because I think it was also missing from the last  
12 draft, but your Honor has instructed the jury that guilt is  
13 individual in a number of different places in this draft.

14 One thing that's missing is that the counts themselves  
15 should be considered individually. That is, it shouldn't be  
16 all or nothing for a particular defendant about whether he or  
17 she is guilty of all the counts or no counts.

18 There are a number of places that that could go in. I  
19 marked one place which I think may cover it, but that is an  
20 idea that I think -- it just takes a few words.

21 The place that I put it is on page 32. On page 32, I  
22 guess it's the fourth sentence on the page, the draft says, "In  
23 reaching a verdict, however, you must bear in mind that you  
24 must consider each defendant" and there I would just insert  
25 "and each count individually with respect to whether the

D81nles1

## Trial

1 government has proved its case beyond a reasonable doubt."

2 And then in the next sentence again I would insert  
3 three words, "Your verdict as to each defendant" on each count  
4 "must be determined separately with respect to him or her."

5 MR. JACKSON: No objection.

6 MR. DRATEL: No objection.

7 THE COURT: That's fairly standard language which we  
8 do use generally. Also one place where I usually deal with  
9 that is in instructing them on the verdict form. We have not  
10 talked about the verdict form, but I will distribute to you a  
11 draft of the verdict form that we usually use giving, you the  
12 format that is fairly standard in this court.

13 MR. WEDDLE: Your Honor, I thought of a verdict form  
14 late last night and we received Mr. Ryan's proposed verdict  
15 form this morning. I think it's unnecessarily detailed. It's  
16 basically a special verdict form. We drafted a simple one and  
17 submitted it to your Honor, but I'm sure it's very similar to  
18 what your Honor typically uses.

19 My next comment was on pages 22 to 23 with respect to  
20 the subpoena instruction that your Honor took out. Mr. Durkin  
21 explicitly made this argument in his summation. I was looking  
22 for the citation, but I haven't had a chance to find it. He  
23 said basically the Gary Supper letter was turned over to the  
24 government and how could Dr. Lesniewski be guilty if he turned  
25 that over to the government.

D81nles1

Trial

1           So that's why we included the proposal on if I  
2   could --

3           MR. DURKIN: Can I have the page.

4           THE COURT: Page 22 and 23.

5           My trouble with that language, Mr. Weddle, is that it  
6   went well beyond the issue that was raised by Mr. Durkin  
7   concerning the one subpoena that was at issue, and it just  
8   seemed unduly complicated in light of what was the issue  
9   insofar as it was touched upon here.

10          MR. WEDDLE: OK, your Honor. Thank you.

11          My next comment is on page 29 to 30. This is the  
12   limiting instruction relating to similar act evidence or 404(b)  
13   evidence.

14          Mr. Rutigliano's false tax returns that he filed year  
15   after year in which he reported no consulting income are acts  
16   in furtherance of the conspiracy. So that's direct evidence,  
17   because the testimony here was that the RRB routinely  
18   cross-checks against tax-reported wages and self-employment  
19   income in order to make sure that people who are receiving  
20   disability are not receiving it improperly because they're  
21   working or because they're making wages that are, making money  
22   more than the \$700 cutoff, which he certainly was.

23          So each of those tax returns are direct evidence of  
24   the charges in the case, and I think maybe we could modify this  
25   a little bit so it only covered Marie Baran's taxes, which were

D81nles1

## Trial

1 admitted as going to her intent in committing the crime.

2 MR. JACKSON: Judge, I would have a lot to say about  
3 that. I don't know what Mr. Ryan will have to say. But in the  
4 event that you are doing that, now you're unduly singling out  
5 one defendant over another, and you are basically inviting a  
6 jury to consider items that pertain to her.

7 I think in doing it that way it certainly becomes an  
8 issue of prejudice, and I think it also becomes an issue of  
9 confusion in that this jury has heard about a number of taxes  
10 and now we're going to focus on Ms. Baran unduly. I will have  
11 a lot more to say about that when it's my turn, but I think  
12 that would be objectionable on that ground.

13 In terms of whether Mr. Rutigliano's is direct  
14 evidence or not, that is something Mr. Ryan will address.

15 MR. WEDDLE: Your Honor, if Mr. Jackson wants to waive  
16 a limiting instruction on similar act evidence, he is obviously  
17 free to do that as a strategic matter. The instruction is  
18 supposed to be protective of his client, but if he would prefer  
19 not to have it, we don't need to have it.

20 I also just wanted to point out, your Honor --

21 MR. JACKSON: Before he points something else out, I  
22 don't want to interrupt him. I don't like the transition  
23 before we deal with an issue.

24 THE COURT: Are we done with this issue, Mr. Weddle?

25 MR. WEDDLE: I was just going to note that your

D81nles1

## Trial

1 Honor's decision of July 12 which granted our motion to admit  
2 the tax evidence expressly found that Rutigliano's taxes were  
3 direct evidence of the crime as well as admissible under  
4 404(b). But one of the alternative grounds your Honor found  
5 was they were direct evidence of the crime and that is on page  
6 19 of your Honor's order.

7 THE COURT: Mr. Jackson?

8 MR. JACKSON: Yes, Judge. I think Mr. Weddle  
9 indicated I might be waiving something. I don't think that's  
10 what I said. My argument was vastly different from that. I  
11 just don't think we should be focusing the jury on one  
12 particular defendant about one particular item. The fact that  
13 your order may have granted alternative theories to the  
14 government on the issue of taxes for Mr. Rutigliano doesn't  
15 take it out of the gambit of similar act evidence. Therefore,  
16 I believe Marie Baran standing alone on that issue would  
17 thereby give it undue weight. Therefore, Judge, I would  
18 certainly object to that.

19 THE COURT: Mr. Ryan.

20 MR. RYAN: I object to this proposition. The evidence  
21 that Mr. Weddle is relying upon is the FBI agent who is part of  
22 this investigative team. He didn't work for the RRB. He gave  
23 some answers that suggested what Mr. Weddle was trying to  
24 develop here.

25 MR. WEDDLE: Marie Baran testified to those facts,

D81nles1

## Trial

1 your Honor.

2 MR. RYAN: Excuse me. We had an IRS official who  
3 acknowledged, and the government can't dispute this, that it  
4 requires a court order to turn over tax returns to another  
5 federal agency as in this case. So that treating the  
6 suggestion of the prosecutor here that it's evidence of intent  
7 to defraud the RRB is totally unwarranted.

8 THE COURT: All right. I have heard the comments.  
9 We'll have to figure out how to deal with it. It touches upon  
10 some potential complications and delicate questions, so we'll  
11 have to think about it.

12 Mr. Dratel?

13 MR. DRATEL: Your Honor, just because we are on that  
14 particular issue, and if the Court is going to restructure that  
15 charge, just right now it says, "In particular I'm referring to  
16 the evidence admitted" -- this is on page 29 at the bottom.

17 THE COURT: Yes.

18 MR. DRATEL: -- "about whether certain defendants  
19 properly reported on their federal tax returns," etc.

20 I understand the objective. It is just also that  
21 because Dr. Lesniewski's returns were also put in evidence, we  
22 didn't want there to be any confusion that they were admitted  
23 somehow with respect to some underreporting aspect.

24 I think it has to be delineated as to which defendants  
25 we are talking about, or in some way that it is not

D81nles1

## Trial

1 Dr. Lesniewski because they certainly were not admitted as  
2 40(b) evidence. They were admitted as part of the government's  
3 theory about how much United Healthcare money meant to him. I  
4 am just concerned about the possible misapplication of those,  
5 because there was also the references to cash during the course  
6 of the trial that the government made even in its summation  
7 about cash, cash. I think they mentioned it two or three  
8 times. So in that context I just don't want there to be any  
9 confusion.

10 THE COURT: All right. Thank you.

11 MR. DRATEL: Thank you.

12 THE COURT: Next issue, Mr. Weddle.

13 MR. WEDDLE: The next issue that I have, your Honor,  
14 is on page 40. This is just I think essentially a  
15 typographical error on page 40. There are two paragraphs there  
16 that I think should be deleted, the one that starts with the  
17 word "third" and the following one. That is just part of  
18 executing this change relating to the fact that Section 1349  
19 does not have an overt act requirement.

20 THE COURT: Yes. Agreed.

21 MR. DRATEL: "Third" and "I will"?

22 MR. WEDDLE: Yes.

23 MR. DRATEL: OK.

24 THE COURT: Page 40. All right.

25 Next?

D81nles1

## Trial

1 MR. WEDDLE: Just to reiterate what I said regarding  
2 statute of limitations, your Honor, on page 47. Right where  
3 there's the stricken language, that might be an appropriate  
4 place to just put in a sentence that says, In order to convict  
5 on a conspiracy count you must find that at least some act in  
6 furtherance of the conspiracy was committed on or after  
7 December 18, 2006. That would be an appropriate place for  
8 that.

9 My next change is on page 52.

10 Later in the charge, your Honor, after page 52, your  
11 Honor instructs the jury further about overt acts and correctly  
12 states that the overt act need not, in fact, be listed in the  
13 indictment. Although the indictment does list overt acts, the  
14 law in the Second Circuit is clear that the jury can convict on  
15 an overt act that is not listed in the indictment.

16 So I just had a couple proposals to fix that language  
17 on page 52, which says the opposite. I guess it's six lines up  
18 from the bottom.

19 It says, "Knowingly committed at least one of the . .  
20 . ." I would delete "of the" and then just make it "at least  
21 one overt act" and then delete to the comma and then say "and  
22 that the overt act which you find to have been committed was  
23 committed" and then delete to where it says "in furtherance of  
24 the conspiracy."

25 THE COURT: Mr. Weddle, could we reread your language



D81nles1

Trial

1 changes so that everyone --

2 MR. WEDDLE: Yes, your Honor.

3 THE COURT: -- can get it down.

4 MR. WEDDLE: So the clause would be, "But any one of  
5 the parties involved in the conspiracy knowingly committed at  
6 least one overt act, and that the overt act which you find to  
7 have been committed was committed in furtherance of the  
8 conspiracy."

9 That would be the clause.

10 MR. DRATEL: So you are taking out some -- OK.

11 MR. JACKSON: Is this new language?

12 THE COURT: It is just modifying language on page 52.

13 MR. JACKSON: Thank you. Which paragraph, please?

14 THE COURT: The bottom paragraph. The last sentence  
15 in that paragraph.

16 MR. JACKSON: Thank you, your Honor.

17 THE COURT: Beginning with the words, "But any of the  
18 parties involved in a conspiracy knowingly committed at least  
19 one" delete "of the," overt act, delete "as" through  
20 "indictment," continue, "and that the overt act that you find  
21 to have been committed was committed" delete "to further some  
22 objective of the conspiracy," continue "in furtherance of the  
23 conspiracy."

24 MR. JACKSON: Got it, Judge. Thank you.

25 THE COURT: Next, Mr. Weddle.

D81nles1

## Trial

1 MR. WEDDLE: Next, on page 54 there's just a bunch of  
2 repeated language coming right after the insertion. That is a  
3 paragraph that starts, "For the crime of conspiracy to have  
4 been committed, that was just said in the insertion so I think  
5 that paragraph can be deleted.

6 THE COURT: All right.

7 MR. WEDDLE: This is just typographical.

8 In the next sentence it says, "You need not find that  
9 the defendant." I think that should be "a defendant in the  
10 case committed the overt act. It's sufficient if you find that  
11 at least one overt act was in fact performed by at least one  
12 coconspirator, whether" a "defendant or another coconspirator."

13 On page 55, your Honor, there's a limiting instruction  
14 relating to conduct by Dr. Ajemian during the course of the  
15 trial. Your Honor also gave the same limiting instruction  
16 regarding conduct of Dr. Parisi.

17 So if you want to conform that by just adding or  
18 Dr. Parisi to the end of that instruction, that might be  
19 appropriate.

20 I think the language on page 56 to 57 is repeated  
21 elsewhere because we made this change where we moved the overt  
22 act instructions around. So I think we've already covered this  
23 language that is on page 56 and the top of 57.

24 THE COURT: That is correct.

25 MR. WEDDLE: With respect to unanimity on overt acts,

D81nles1

## Trial

1 your Honor, the law in the Second Circuit is clear on that  
2 issue, that unanimity is not required with respect to overt  
3 acts, and I think we cited in our requests to charge or  
4 possibly in the joint requests to charge the Kozeny case, which  
5 is I think among the cases that stands for that proposition.  
6 So I would suggest just deleting that.

7 MR. JACKSON: Deleting what where?

8 THE COURT: This is on page 57.

9 MR. WEDDLE: I'm sorry. Page 57. The sentence that  
10 says, "but you must be unanimous on what the overt act is." I  
11 think that could be eliminated.

12 THE COURT: We will take a look at that one.

13 I think my next change is on page 62, really 61 to 62,  
14 where your Honor is talking about materiality.

15 The language that your Honor has in the draft is, "A  
16 material fact is one that would reasonably be expected to be of  
17 concern to a reasonable and prudent person in relying upon the  
18 representation or statement to make a decision."

19 Then it continues to say, "The statement has to be one  
20 that a reasonable person might have considered important in  
21 making his or her decision."

22 I think that is language that appears in some older  
23 case law and I think has been somewhat revised in subsequent  
24 case law, namely, the Neder case from the Supreme Court, which  
25 we cited in our motion in limine at page 12. But the citation

D81nles1

## Trial

1 is Neder v. United States 527 U.S. 1. The quotation that we  
2 would request that your Honor use to describe materiality  
3 appears on page 16 of that case. The language in Neder says --  
4 well now I'm reading from our brief, "Materiality is an  
5 objective test that looks only at whether the false statement  
6 has" and then this is a quote from Neder, "a natural tendency  
7 to influence or is capable of influencing the decision of the  
8 decision-making body to which it was addressed."

9 That's the Supreme Court's formulation, and I think  
10 it's less confusing, particularly with respect to the settled  
11 law that gullibility of a victim is no defense to the charge.  
12 I think the language about reasonable and prudent people  
13 creates confusion and tension with that settled proposition of  
14 law. So we would suggest that the Court instead just use the  
15 quotation from Neder.

16 THE COURT: All right.

17 MR. JACKSON: What year is that case, please?

18 MR. WEDDLE: 1999.

19 MR. JACKSON: Judge, I would just like to look at that  
20 further. That is the language I've always seen as it relates  
21 to material facts. But the fact that one court once upon a  
22 time in 1999 indicated something different doesn't persuade me  
23 that this should be taken out.

24 THE COURT: It wasn't just one Court.

25 MR. JACKSON: It was the biggest court obviously, but

D81nles1

Trial

1 that is not to say that there have been formulations in  
2 subsequent cases which had this language in it and that's what  
3 would I like to check.

4 THE COURT: We'll take a look at that, too. 1999 is  
5 not last year or the year before, and there might be other case  
6 law that might be Second Circuit and more recent than 1999 that  
7 may address this issue. We will take a look at it.

8 MR. WEDDLE: I believe that is all we have, your  
9 Honor.

10 THE COURT: Thank you. We will go to the defense.

11 Mr. Dratel?

12 MR. DRATEL: Thank you, your Honor.

13 The only matter -- well, two things.

14 With respect to the overt act and unanimity, we think  
15 that is appropriate because it is an element of the offense. I  
16 think because it is an element of the offense and because  
17 elements of the offense need to be found unanimously by a jury  
18 that that would apply here. So that's our position.

19 THE COURT: We'll take a look at the case law on that.

20 MR. DRATEL: The only thing I have is on page 86  
21 through 88 on the occupational disability instruction.

22 THE COURT: Let me come back to -- sorry to interrupt.

23 MR. DRATEL: That's OK.

24 THE COURT: On the overt act issue, there are two  
25 concepts. One is how they determine which overt act, and

D81nles1

## Trial

1 second is whether they are unanimous as to the finding of the  
2 overt act. In other words, there could be five overt acts  
3 charged, and one juror may say let's find one and another may  
4 say let's find two, etc., etc. The issue, as I understood it,  
5 is that they have to be unanimous as to which overt act they  
6 are finding.

7 MR. DRATEL: That's my position as well, your Honor.

8 Yes.

9 THE COURT: As opposed to whether or not they are  
10 unanimous or whether or not there is agreement that the overt  
11 act did take place.

12 MR. DRATEL: I think they would have to be unanimous  
13 that it did occur, your Honor.

14 THE COURT: We will take a look at that.

15 MR. DRATEL: My analogy is to other types of compound  
16 offenses. For example, let's say a 848 continuing criminal  
17 enterprise, where you have to have three drug felonies in order  
18 to have an 848 conviction. The jury has to be unanimous as to  
19 the specific three they find. In a RICO they have to be  
20 unanimous as to the two predicate acts. These are subelements  
21 of an offense or elements of the offense, essentially an overt  
22 act. The Court has defined it as an element. So I think they  
23 would have to be unanimous.

24 THE COURT: We will take a look at it.

25 MR. DRATEL: That's the basis for our position.

D81nles1

## Trial

1 THE COURT: Mr. Weddle, on this point?

2 MR. WEDDLE: Yes, your Honor. Just to give your Honor  
3 a little bit more detail, United States v. Kozeny appears at  
4 667 F.3d 122. The relevant portion of the case is at pages 131  
5 to 32. That is a Second Circuit 2011 case wherein the Second  
6 Circuit said that the jury need not be unanimous about which  
7 overt act was committed, just that an overt act was committed.

8 THE COURT: Yes, Mr. Dratel.

9 MR. DRATEL: I was going to say I don't dispute the  
10 case law. I don't have it so I don't know whether it's  
11 distinguishable in regard to what is precisely said, but  
12 regardless, with all due respect to him, that's just wrong.  
13 Because we had this issue for years with respect to objects of  
14 a drug conspiracy, whether it was a particular type of drug.  
15 Now it has to be the type of drug. This is going to be worked  
16 out in some way where it's going to be wrong if they don't have  
17 to be unanimous because it is an element of the offense. So  
18 that is our position.

19 THE COURT: The element is, Mr. Dratel, that an overt  
20 act occurred.

21 MR. DRATEL: But there is also an element -- look at  
22 it this other way. There is also an element that someone  
23 conspired to sell drugs, but you have to know what drug. It  
24 has to be agreed as to what drug it is. There has to be an  
25 agreement. You can't have someone who conspired to sell crack

D81nles1

Trial

1 and someone who conspired to sell cocaine and the jury be half  
2 and half on that. That was litigated for a long time before  
3 now, and we have it. I just want to cut to the chase of what  
4 the proper analytical result should be.

5 THE COURT: All right. We will take a look at it.

6 MR. DRATEL: Thank you, your Honor.

7 Can I move to 86 to 88?

8 THE COURT: Yes.

9 MR. DRATEL: That's the occupational disability  
10 instruction. The definition of occupational disability is  
11 fine.

12 What I think is extraneous, unnecessary, and  
13 misleading and incomplete, and I know this comes from the  
14 government's proposed instruction is the final paragraph on  
15 page 88. That is not about defining occupational disability.  
16 That is about the process.

17 It is a different section of the CFR than the  
18 definitional section. It's about medical conclusions. There  
19 are three additional subsections that would need to be read.

20 It is unnecessary. It's really evidentiary and not  
21 legal. I think that has nothing to do with the definition of  
22 occupational disability and should be deleted.

23 So that's one.

24 MR. JACKSON: Judge we collectively don't think that  
25 that has to do with occupational disability. It is something



D81nles1

Trial

1 we discussed and endorse.

2 THE COURT: All right.

3 MR. DRATEL: The second is, going back to the first  
4 paragraph, despite the government's opening summation, this is  
5 not about total and permanent disability, this case. I don't  
6 know why we have a definition of it in there, starting with  
7 "There are two disability standards."

8 I would eliminate "Starting with there are two  
9 disability standards" through -- actually, that whole sentence  
10 and just say, "Under the Railroad Retirement Act to be  
11 occupationally disabled," etc.

12 I think, again, it's confusing to the jury. It's not  
13 a charge in this case. It is an amendment of the indictment to  
14 suggest that because someone is not totally and permanently  
15 disabled and is defrauding the government on that ground that  
16 they are guilty.

17 That is an amendment, because that's not in the  
18 indictment. I read it carefully last night. There's one  
19 mention of total and permanent disability, and it has nothing  
20 do with the allegations in the case. Every allegation is about  
21 Railroad Retirement occupational disability.

22 The charge itself is entitled "Occupational  
23 Disability," and that's all it should cover. Thank you.

24 THE COURT: Thank you. Mr. Weddle.

25 MR. WEDDLE: Your Honor, the allegations in the

D81nles1

## Trial

1 indictment are the defendants made false claims in order to get  
2 this money. The application is simply an application for  
3 disability. It is not directed toward occupational disability  
4 or total and permanent disability.

5 Mr. Rutigliano and Mr. Baran, based on their false  
6 claims and the false claims made on their behalf by  
7 Dr. Lesniewski, obtained total and permanent disability.

8 I think that the opening statements of counsel really  
9 highlighted the fact that this isn't just a case about  
10 occupational disability. I think the evidence has all come in.  
11 These are legal matters. Everything in this instruction is  
12 directly from the Code of Federal Regulations. So these are  
13 legal matters. It shouldn't be something that the parties are  
14 disputing factually. They are legal matters that your Honor  
15 can instruct the jury.

16 MR. DRATEL: Your Honor, paragraph 1 of the  
17 indictment: "Lesniewski assisted retirees from the Long Island  
18 Rail Road Company applying for occupational disability benefits  
19 from the United States Railroad Retirement." Statutory  
20 allegations.

21 THE COURT: All right.

22 MR. DRATEL: It is all through here. There is no  
23 allegation here of total and permanent disability. It's all  
24 throughout the indictment.

25 THE COURT: I see that this could cut both ways,

D81nles1

## Trial

1 Mr. Dratel. Even if the case is about only occupational  
2 disability, there was so much reference to total disability  
3 that it would not be inappropriate to tell the jury that there  
4 are two standards even though the case is about the one, so  
5 that they don't confuse it.

6 MR. DRATEL: I understand that position and there's  
7 merit to that, but only if there is also an instruction that  
8 this case is about occupational disability. I don't want them  
9 to be judging the applications in the context of total and  
10 permanent disability, because there was not a single patient  
11 who came in and testified that they went to Dr. Lesniewski and  
12 said, by the way, I'm looking for a total and permanent  
13 disability.

14 THE COURT: We will take a look at it as well.

15 Mr. Jackson.

16 MR. JACKSON: Judge, just on that issue, if we are  
17 going to put anything about total and permanent, it needs to be  
18 made clear that that determination is made by an RRB doctor.

19 Dr. Lesniewski did not opine or otherwise suggest  
20 anything regarding or any other doctors. Once you put in the  
21 application, the RRB doctor makes an assessment as to whether  
22 it's total and permanent.

23 So it has to be very clearly laid out for the jury if  
24 we're going down the road, because your Honor doesn't think,  
25 it's not inappropriate to let them know because of the

D81nles1

## Trial

1 discussion and the distinction between occupational disability  
2 and total and permanent disability, that the RRB and the  
3 officials at the RRB are the ones who make that assessment, no  
4 other doctors.

5 THE COURT: Here you are getting into a contradiction,  
6 Mr. Jackson. You all indicated before that you don't want  
7 language dealing with process as opposed to definition. I was  
8 going to take out the language at the end of the paragraph  
9 dealing with process.

10 MR. JACKSON: Judge, it is not a contradiction  
11 inasmuch as I think it's confusion. Because certainly the jury  
12 could come to the false conclusion that the doctors who in the  
13 government's view were a fraud were opining or making  
14 distinctions between what constituted total and permanent and  
15 what constituted occupational disability. And that's not so.

16 Anything having to do with total and permanent had  
17 nothing to do and far exceeds the purview of what any doctors  
18 here which were allegedly engaged in illegality were doing. I  
19 think if you put total and permanent, it might have the  
20 tendency to confuse the jury such that these doctors were  
21 opining in that regard, and they were not. So it's not so much  
22 a process issue. It is a very important factual issue.

23 THE COURT: All right. Thank you.

24 Anything else from defense?

25 MR. JACKSON: Judge, I have a number of things, but I

D81nles1

## Trial

1 think Mr. Ryan --

2 THE COURT: Mr. Ryan, do you have anything else?

3 MR. RYAN: I will go in reverse on this one.

4 At the bottom of 87 you cite the CFR section, and my  
5 suggestion is that the jury consider the implementation of this  
6 phrase based upon the testimony in the case. Because the  
7 agency in implementing this definition has testified that if  
8 the worker was unable to perform one or more tasks or couldn't  
9 perform the full range of his duties, that is the meaning of  
10 this provision in 20 C.F.R. 220.13, etc.

11 THE COURT: Mr. Ryan, your colleagues indicated  
12 earlier what I just indicated to Mr. Jackson, that there are  
13 concerns about getting beyond definitions and going into  
14 process. And I pretty much agreed, and I was inclined to  
15 delete the references at the bottom of 87 top of 88 to  
16 processes as opposed to the beginning of the paragraph dealing  
17 with definitions.

18 MR. RYAN: Other requests to charge which your Honor  
19 has considered made the suggestion that occupational disability  
20 is defined by the agency as one or more ways, etc.

21 Now I am going to go back, Judge, to the beginning.  
22 If you want to shorten this charge, I suggest that you strike  
23 all the withdrawal language on 47 and 57 concerning this  
24 conspiracy because none of the defendants are alleging that  
25 they were conspirators and that they withdrew. Each defendant

D81nles1

Trial

1 says there was no conspiracy, so it is irrelevant. It is a  
2 suggestion made by the government.

3 THE COURT: Each defendant is saying that; the  
4 government is saying otherwise. That's what the jury is going  
5 to find.

6 MR. RYAN: That is as to whether there is a  
7 conspiracy.

8 THE COURT: Right.

9 MR. RYAN: These charges deal with withdrawal from a  
10 conspiracy. You have to do something to withdraw from it.

11 None of the defendants are claiming that. None of the  
12 defendants are claiming if I was a member of the conspiracy  
13 then I withdrew. Mr. Rutigliano isn't claiming that. He's  
14 claiming he was never a member of the conspiracy.

15 So the withdrawal language is immaterial and  
16 irrelevant, and it could confuse the jury. And it would  
17 shorten the charge significantly.

18 THE COURT: Mr. Dratel, on this point?

19 MR. DRATEL: I just wanted to make sure that we didn't  
20 have to restate the objections we made yesterday. Today I  
21 didn't restate any objections that I had made yesterday that  
22 had not been incorporated into the revised charge. I wanted to  
23 make sure.

24 THE COURT: You can have objections as to other things  
25 that we have not gone over. They are preserved.

D81nles1

## Trial

1 MR. DRATEL: Thank you, your Honor.

2 Also, just to clarify on 87 and 88, I did not mean to  
3 eliminate what is on the bottom of 87 because I think that does  
4 go to the definition in terms of railroad job. It is only the  
5 top of 88 which has to do with the process.

6 THE COURT: We'll examine that.

7 MR. DRATEL: Thank you, your Honor.

8 MR. RYAN: Another way to shorten the charge is my  
9 suggestion on 81 concerning negligence of the RRB. There is no  
10 defendant in this case that's claiming that the RRB was  
11 gullible and negligent. We are claiming they did their job.  
12 They fulfilled their obligation. They got this medical  
13 evidence and they made objective findings as to whether or not  
14 the applicants were eligible under the Railroad Retirement Act.

15 So negligence is not an issue in this case. It was an  
16 issue in the prior case. Dr. Ajemian's lawyer was making that  
17 claim, and the government relished it. But it is not an issue  
18 in this case. So that would be another way to shorten the  
19 charge.

20 THE COURT: On that point, Mr. Ryan, you may recall  
21 that at the end of yesterday's proceedings I indicated that I  
22 thought this was appropriate.

23 MR. RYAN: I understand that.

24 THE COURT: Even if the defendants had not put it into  
25 the case, it would not be unreasonable for jurors to speculate

D81nles1

Trial

1 about what was happening up there and why didn't they do what  
2 they were supposed to do. I know that you say that they did.  
3 But I think on this record reasonable people might be inclined  
4 to wonder and, therefore, make an improper conclusion based on  
5 what they view to have been the real cause.

6 MR. RYAN: There is a recent case on materiality. I'm  
7 sorry I don't have it here. It was in the last week, the  
8 Second Circuit, on materiality. I will check it as soon as I  
9 can.

10 THE COURT: We will look for it, too.

11 MR. RYAN: Mr. Weddle made a suggestion about striking  
12 page 54 some language dealing with overt acts. I found that  
13 that paragraph on 54 the second paragraph was very helpful and  
14 shouldn't be stricken.

15 THE COURT: The reason he suggested striking it is  
16 that the same point is covered in the text just above it.

17 MR. RYAN: It doesn't say it in the same language. I  
18 think it's much more articulate and meaningful as it is. I  
19 think your Honor did a great job.

20 THE COURT: We will examine it.

21 MR. RYAN: Thank you.

22 THE COURT: If there is something in that paragraph  
23 that should be retained that is not expressed earlier, we will  
24 retain it.

25 MR. RYAN: My final point is the defendant's theory of



D81nles1

## Trial

1 the case. The Second Circuit has held that a defendant is  
2 entitled to have the Court instruct the juries to what the  
3 defendant's theory of the case is. The cross-examination in  
4 this case has brought out all of the points that we have set  
5 forth as the defendant's theory of the case. I urge your Honor  
6 to include it in the charge.

7 THE COURT: Mr. Ryan, I have examined your proposed  
8 theory of the case. The problem I have with it is that  
9 essentially it is argumentative, and it puts the Court in the  
10 position of unduly suggesting to the jury material which is not  
11 in the record, and it would sound almost like an endorsement of  
12 the theory.

13 MR. RYAN: That would be true of any defendant's  
14 theory of the case.

15 THE COURT: What matters is how it's worded, Mr. Ryan.  
16 I will examine your language and see if we can articulate a  
17 defense theory that does not raise the concerns that I have.

18 MR. RYAN: Very well, your Honor. Thank you.

19 THE COURT: Mr. Jackson.

20 MR. JACKSON: I would like to raise some concerns  
21 about things not in the instructions that I think your Honor  
22 might consider some curative instructions about. I am very  
23 concerned about the manner in which the government has alluded  
24 to -- beyond alluded to, essentially attacked, diminished,  
25 criminalized, and otherwise, just for lack of a better word,

D81nles1

## Trial

body slammed Mr. Baran in this case, I think, and the prejudicial effect it causes.

let me just back in to what I am saying to you. One of the things that was stated, and I think this doesn't only apply to Mr. Baran, but it applies to the defendants collectively.

One the of the things that Mr. Weddle said in his closing, in his rebuttal, was that in the event that we as defense attorneys are looking to have the jury examine the RRB files, we are -- and I'll quote him -- we are asking them to look at the tools of the fraud. The tools of the fraud.

Most respectfully, Judge, there are a variety of things in those RRB files that have nothing at all to do with the doctor who is here being charged or the other doctors who are allegedly coconspirators, namely, Parisi and Ajemian.

In fact, much of the RRB file is independent of those doctors and assessments found by RRB officials as to disabilities.

Certainly in inviting them to look at Mr. Baran's file, I think the jury would be interested to find many items in there having nothing to do with Lesniewski, and the fact that the government's trying to attach Mr. Baran to Mr. Lesniewski as if he's the only doctor that there would ever be information about.

So to make a blanket statement that the RRB claim

D81nles1

## Trial

1 files -- that I am suggesting and we all, I believe, suggested  
2 that the jury look at -- would be inviting them to look at  
3 tools of the fraud, I think is extraordinarily misleading, and  
4 I think that needs to be cured. Because I think what they will  
5 find is a number of things from doctors, including the RRB  
6 doctors, that confirm the disabilities that are noted. So I  
7 think that needs to be addressed. The other issue I have --

8 THE COURT: Before you go to another issue,  
9 Mr. Jackson, what you are suggesting is that -- let me put it  
10 in the form of a question. Which part of your closing argument  
11 should the Court adopt into an instruction?

12 MR. JACKSON: Judge, I am not looking for an adoption  
13 of my closing argument into an instruction. What I'm looking  
14 for is the jury to know and understand that the RRB file  
15 contains a lot more than quote-unquote tools of the fraud.

16 THE COURT: That was what you told them. The  
17 government said they did, and you said they did not.

18 MR. JACKSON: That is what Mr. Weddle told them.

19 THE COURT: Yes. I'm saying Mr. Weddle, the  
20 government said they did; and you collectively essentially said  
21 they are not, that those are perfectly legitimate records and  
22 they contain not just one doctor but many doctors. That was  
23 what the whole dispute was all about.

24 MR. JACKSON: It was about a lot more than that, which  
25 I will get into. But I just think that that transcends the

D81nles1

## Trial

1 bounds of argument when you are telling them that we're telling  
2 them to look at tools of the fraud.

3 That is not tools of the fraud. Those are  
4 confirmatory tests. There are RRB doctors evaluated them and  
5 determined them to be totally disabled or certainly confirmed  
6 disability.

7 There are other doctor materials in those records. So  
8 to mislead the jury into thinking that those files are tools of  
9 a fraud I think is certainly over the top.

10 THE COURT: OK. Again --

11 MR. WEDDLE: I would just note, your Honor -- I'm  
12 sorry.

13 THE COURT: That was what this entire case is about.  
14 The government has one theory of what those statements say, and  
15 you have another. Each of you argued it ad nauseam before the  
16 jury.

17 MR. JACKSON: All right. Well --

18 THE COURT: I don't know exactly where this would  
19 lead. I don't know how you would have the Court deal with that  
20 issue in the instructions other than to --

21 MR. JACKSON: By allowing to the jury to know that the  
22 RRB files contain information from sources beyond people who  
23 are on trial here, whether they be doctors or otherwise.

24 THE COURT: That is exactly the problem that I have.  
25 You are asking the Court to endorse matters of fact, to take

D81nles1

Trial

1 issues that are factual disputes --

2 MR. JACKSON: I am not asking the Court to endorse  
3 facts. I am asking the Court to take the cover off of  
4 misrepresentations that are made. There are facts, and there  
5 are misrepresentations.

6 THE COURT: When you use words like "take the cover  
7 off misrepresentations" is that not having the Court  
8 essentially make a normative judgment that what the government  
9 said was a misrepresentation.

10 MR. JACKSON: It is allowing the Court to say, you  
11 know what, ladies and gentlemen --

12 THE COURT: The government lied to you. The  
13 government misled you.

14 MR. JACKSON: I don't want that to be said, although I  
15 wouldn't mind it. But I am not suggesting that, Judge.

16 THE COURT: That's the problem, that I mind it.

17 MR. JACKSON: I am just saying --

18 THE COURT: Would the government mind if I said that?

19 MR. WEDDLE: Your Honor, I would just note that that  
20 was about the only sentence in my rebuttal that no defense  
21 counsel objected to.

22 MR. JACKSON: In any event, along those lines of a  
23 curative instruction, I think something certainly needs to be  
24 done about the fact that another thing that was very disturbing  
25 is the burden shifting that was done. The government alluded

D81nles1

## Trial

1 to, Mr. Weddle did, that I had the right to call witnesses.

2 All right. The fact is they called Dr. Barron. Dr.  
3 Barron, who doesn't examine, poke, or prune or do anything else  
4 to Mr. Baran, he makes this opinion about the fact that he's  
5 just not disabled at all. He doesn't have spinal stenosis or  
6 anything else, when there are 12 other doctors that they could  
7 have called.

8 I make the argument, and it puts me in a very  
9 difficult place when the government says, well, I could have  
10 called whomever. I don't represent Mr. Baran, Judge. I can't  
11 turn this into another minitrial about Mr. Baran by calling  
12 other doctors, nor do I have that obligation or responsibility.  
13 I think certainly it needs to be made clear that the jury that  
14 I don't in ways that are beyond what is placed in the charges.

15 (Continued on next page)

16  
17  
18  
19  
20  
21  
22  
23  
24  
25

D81LLES2

1 MR. JACKSON: In addition to that, your Honor, I'm  
2 just not sure in me not representing Mr. Baran or me having any  
3 obligation even to have a defense, how the government could  
4 suggest in their closing statement about subpoena powers that I  
5 might have and I could call and I'm entitled, although I don't  
6 really, the defense doesn't really have to call anybody, but  
7 they could have called, Judge, that's not proper and it's  
8 inappropriate.

9 And along those same lines, I think the whole  
10 discussion about tying the albatross around Ms. Baran's neck  
11 with her husband is unduly prejudicial. And I think again  
12 there comes a time where it transcends fair argument and it  
13 just unduly gives the jury an impression that I think she  
14 shouldn't get, or, in the event that they do, certainly could  
15 lead them to draw inferences about Ms. Baran even though I  
16 think obviously they'd be wrong in doing that.

17 But I just think there's something that needs to be  
18 done with regard to alerting the jury about that.

19 THE COURT: Well, Mr. Jackson, you may recall that we  
20 had a discussion yesterday at side bar on one issue where  
21 precisely that concern was raised. I raised it. You recall  
22 the context in which we were trying to provide for a form of  
23 curative instruction as to that one issue. At that point you  
24 objected.

25 MR. JACKSON: Well, no, I objected to the instruction.

D81LLES2

1 Judge, I didn't object to a curative instruction. I objected  
2 to before I was about to give my opening statement a curative  
3 statement that highlighted an exhibit that I objected to, I  
4 didn't want to go into evidence. I thought it was cumulative,  
5 prejudicial, misleading, confusing. And the moment before I  
6 stand up to address it, we highlight and blow up for the jury  
7 we heard this exhibit, you saw this exhibit, we know everybody  
8 looked at the exhibit, but let's not factor that in because it  
9 deals with Mr. Baran. That's the reason I didn't object  
10 because it would have drawn their attention to something that I  
11 think I didn't want their attention drawn to.

12 THE COURT: Are you suggesting that we come back to  
13 that concern and find a way of, a curative instruction that  
14 deals with that concern? Not concern about the exhibit itself,  
15 but the concern about the relationship, the spousal  
16 relationship between Mr. and Mrs. Baran.

17 MR. JACKSON: As long as it's a curative instruction  
18 that doesn't unduly highlight a specific piece of evidence, we  
19 could discuss it. And in the event that we could agree to its  
20 language, then, yes, it should be included. In the event that  
21 I think it unduly highlights something that as I thought again  
22 your Honor's instruction did, then we could -- then I would go  
23 in another direction.

24 THE COURT: All right. Thank you.

25 MR. JACKSON: That's all I have.



D81LLES2

1 THE COURT: Mr. Durkin hasn't been heard.

2 MR. DURKIN: Your Honor, still on the theory of the  
3 case.

4 THE COURT: Yes.

5 MR. DURKIN: Would you entertain a one sentence --  
6 I'll show it to Mr. Weddle and I'll read it to you -- one  
7 sentence theory of the case instruction for Dr. Lesniewski. It  
8 simply reads: It is Dr. Lesniewski's theory of the case that  
9 he did not intentionally enter into a conspiracy to defraud the  
10 Railroad Retirement Board of the United States, United  
11 Healthcare, or any other entity.

12 THE COURT: Well, that's implicit in the instruction  
13 where it says that the defendants have denied the charges, but  
14 it's just another way of elaborating on the denial.

15 MR. DURKIN: If you would give that, I'd appreciate  
16 it.

17 THE COURT: All right.

18 MR. JACKSON: Judge, are you considering giving the  
19 theory of the case instruction? Because I certainly would hand  
20 ours up.

21 THE COURT: I invited each of you to submit what you  
22 think would be the theory of your case in a way that does not,  
23 in essence, put the Court in a position of endorsing the theory  
24 of the case.

25 MR. JACKSON: Thank you, Judge.

D81LLES2

1 THE COURT: And also does it in a brief, concise, to  
2 the point, direct language.

3 MR. JACKSON: You mean we can't submit our closing  
4 argument.

5 THE COURT: Correct.

6 MR. JACKSON: OK.

7 THE COURT: Anything else, Mr. Weddle?

8 MR. WEDDLE: Just to respond to what Mr. Jackson said.

9 My argument was entirely proper. It responded  
10 directly to Mr. Jackson's argument that we should have called  
11 other clients of Marie Baran and doctors of Mr. Baran. I said  
12 he's talking -- talking about Mr. Jackson -- he's talking about  
13 Marie Baran's own clients, people she testified alternatively  
14 she couldn't remember or they were close friends of hers. She  
15 can call them to the witness stand. Feel free. He's talking  
16 about Gus Baran's doctors. He can call them to the witness  
17 stand.

18 So I wasn't talking about calling Gus Baran to the  
19 witness stand. I was talking about Gus Baran's doctors.

20 I should also add, your Honor, that if Mr. Jackson  
21 has -- he went on in his argument and not only did he say that  
22 the government should have called these other doctors, but he  
23 invited the jury to speculate about what those other doctors  
24 would have said had they been called. And he had no good faith  
25 basis for doing that because we have interviewed, for example,

D81LLES2

1 Dr. Geiger, who Mr. Jackson spoke a lot about during this  
2 trial, and Dr. Geiger told us and we informed Mr. Jackson that  
3 if Gus Baran was out playing golf on a regular basis -- ever,  
4 then Gus Baran lied to Dr. Geiger. That's what his testimony  
5 would have been.

6 So it's entirely improper for Mr. Jackson to get up  
7 here and invite the jury to speculate about facts that are  
8 simply false.

9 MR. JACKSON: Judge.

10 MR. WEDDLE: My argument was proper. We've been over  
11 this a couple of times, and I said expressly that the  
12 defendants have no burden. There's no burden shifting here. I  
13 did exactly what I was supposed to do. I went back over the  
14 transcript last night to make sure and there's nothing here. I  
15 think Mr. Jackson is just a little dissatisfied with the way  
16 the arguments went.

17 MR. JACKSON: Judge, I appreciate Mr. Weddle's  
18 evaluation of my satisfaction or lack thereof. Now we're  
19 getting into mind reading.

20 But just getting into the facts of the case, Judge, in  
21 terms of good faith/bad faith because the government likes to  
22 throw argue accusations about people's faith and lack of faith,  
23 let's just stick to the facts if we could.

24 In terms of good faith, I thought I questioned their  
25 doctor about whether or not and I questioned him about whether

D81LLES2

1 he spoke to any of Mr. Baran's doctors, whether he conveyed any  
2 thoughts to them, whether he got any files from them, whether  
3 he evaluated them. I also through Ms. Baran discussed the  
4 totality of Mr. Baran's doctors and the nature of which he was  
5 treated.

6 And so for them to say I had no good faith basis  
7 about, you know, inferring that these doctors would have come  
8 here and say anything other than the fact that he's disabled I  
9 think is completely disingenuous.

10 And if they wanted to invite Dr. Geiger or anybody  
11 else, they were welcome to. And when the government told me  
12 that, hey, we talked to Geiger and we're going to call him if  
13 you open this door, my words to them were please call him. We  
14 have a lot of other doctors that we can call too. Prove your  
15 case. I intend to prove mine.

16 So the fact they didn't call another doctor is up to  
17 them. It's their prerogative. But it's not my job to be  
18 calling a doctor to justify Mr. Baran, who I don't represent,  
19 who they're pushing me into a position as if I do represent him  
20 and suggesting and making innuendoes to the jury regarding what  
21 I could do and could not do for a person not my client that  
22 they're going to try to attach to mine.

23 And so I completely acted in good faith. I'm not sure  
24 that the government did. Thank you.

25 THE COURT: All right. Thank you, Mr. Jackson.

D81LLES2

1           This issue the parties are arguing now is not  
2 uncommon. It comes up quite frequently in criminal cases.  
3 That is the reason why there's a fairly standard instruction  
4 which you will find here or certainly it comes straight out of  
5 Sand's instructions. The government is not required to use any  
6 particular technique in trying its case or to call any  
7 particular witnesses, and if they don't, well, the government  
8 has the burden of proof.

9           MR. JACKSON: They sure do, Judge, but they shouldn't  
10 be suggesting I have a burden of proof to the jury.

11           THE COURT: It's also quite common for the government  
12 in response to your kind of argument to say we didn't call a  
13 particular doctor, well, that was our prerogative. And if the  
14 defendants wanted to hear from him, they could have called him.  
15 That's not suggested that you have to do anything. It's a  
16 proper, very common way in which the government responds to  
17 exactly the argument that defense always makes, why didn't they  
18 call such and such a person, why the one that they called.  
19 Very common.

20           So I'm not persuaded that we need to go into this  
21 anymore.

22           Is there anything else? We need time to come back,  
23 reflect on your comments, do the research that we said we would  
24 do and make adjustments and then come back with a set of  
25 instructions that will be the final instructions.

D81LLES2

1 Yes, Mr. Weddle.

2 MR. WEDDLE: This is beyond the instructions, your  
3 Honor.

4 THE COURT: Yes.

5 MR. WEDDLE: Your Honor had mentioned that we should  
6 formally describe which counts we're not proceeding on. I  
7 drafted up a letter. Unfortunately, I only have one copy. I  
8 wonder if I can hand it up to your Honor and email to defense  
9 counsel as soon as we break, but it is a chart that lists out  
10 all the counts of the original indictment, a brief description  
11 of them, and then, if applicable, whether they've been dropped  
12 and then the count number in the redacted indictment.

13 And then at an appropriate time, once defense counsel  
14 has had an opportunity to check over the letter and make sure  
15 it looks OK to them, we would just move to dismiss the counts  
16 that are listed as dropped.

17 MR. RYAN: I would move for a judgment of acquittal.

18 THE COURT: Again.

19 MR. RYAN: Which I have done.

20 Judge, is this a good time to take a break and we can  
21 consider these matters?

22 THE COURT: Let's make sure you all look at this  
23 before it gets handed up.

24 (Pause)

25 MR. RYAN: The way I read this, Judge, the government

D81LLES2

1 dropped nine counts. They conceded nine --

2 MR. WEDDLE: Judge.

3 MR. RYAN: -- against Mr. Rutigliano based upon their  
4 failure to prove.

5 MR. WEDDLE: I guess Mr. Ryan is just making that  
6 comment for the press. It's --

7 MR. RYAN: Excuse me, my comments are made to the  
8 Court. Thank you very much.

9 THE COURT: All right. Mr. Weddle, anything else?

10 MR. WEDDLE: Your Honor, as I said yesterday, we just,  
11 because our proof was coming in in such an exceptionally  
12 compelling fashion, we decided to streamline the case and  
13 forego calling some additional witnesses who would have  
14 testified in a similar manner to the witnesses that we did call  
15 about the guilt of the defendants and, therefore, we elected  
16 not to proceed on certain of the counts that are enumerated in  
17 the letter that I sent to your Honor.

18 I should also add, your Honor, on a separate point, I  
19 did circulate by email a second redacted indictment which made  
20 the one change that I discussed with your Honor yesterday and  
21 that is to just delete some of the language from Count 21  
22 related to that other theory of false statements that was  
23 originally charged in the indictment and we elected not to  
24 pursue and instead just to rely on the single theory.

25 MR. RYAN: Judge, I'll have to review that. I didn't

D81LLES2

1 realize there was a second redacted indictment.

2 THE COURT: Mr. Weddle, my law clerk has just raised a  
3 technical question. On page 28, you have a table listing the  
4 counts and the defendants and the question has arisen as to  
5 whether that listing of the charged defendants by count has  
6 been adjusted to reflect the dropping of some particular  
7 counts. You may just want to take a look at it and see if  
8 there's any technical difficulty in that light.

9 MR. WEDDLE: I have a copy. May I have a copy or may  
10 I have my letter back? I think I had it right.

11 THE COURT: Why don't you examine that and what I  
12 suggest we do is try to see if we can come back around 12:45, a  
13 few minutes before the jury comes in to go over resolution and  
14 the Court's disposition of some of these issues. Thank you.

15 (Recess)

16 (Continued on next page)

17  
18  
19  
20  
21  
22  
23  
24  
25



D81nles3

## A F T E R N O O N      S E S S I O N

(2:15 p.m.)

THE COURT: Thank you. Be seated.

We have a substantial amount to go over and a limited amount of time to do it in given that the jury has already been waiting for an hour and 15 minutes.

First, I distributed a draft of the Court's version of the verdict form. Have all the parties received the Court's draft verdict form?

MR. WEDDLE: Yes, your Honor.

THE COURT: We don't need to go into details about that at this point because it is more important that I flag for you the instructions where I made the substantive changes that were the subject of much discussion earlier today. You don't have hard copies because we just were able to e-mail them to you, so let me just highlight where the changes occur in the black-lined version that we e-mailed to you.

First is on pages 29 and 30, which deal with the question of the tax returns. What I did there is made reference to the fact that tax return evidence was presented, and I indicate that generically as to each of the defendants this tax return evidence cannot be used, is not evidence -- let me just back up. I remind the jurors that none of the defendants here is charged with any offense relating to tax returns, either failure to file or failure to pay, and then go

D81nles3

1 specifically as to Ms. Baran and recall the limiting  
2 instruction that was given at the time that the tax return  
3 evidence was presented in connection with her and that that  
4 limiting instruction directed the jury to consider that  
5 evidence only for the purposes of intent, knowledge, motive,  
6 etc.; and then, with regards to Mr. Rutigliano, to call to the  
7 jury's attention that the government argues that the tax return  
8 evidence is not only for the purpose of intent, knowledge, and  
9 opportunity, etc., but that the government contends that it is  
10 evidence of failure to report the income, is evidence of fraud  
11 against the RRB because he was, according to the government,  
12 required to inform the RRB of any other income. So for that  
13 purpose the jury may consider the evidence if it finds that, in  
14 fact, Mr. Rutigliano received the income and failed to report  
15 it to the IRS.

16 The next big change is on page 56 of the black-line.  
17 There is the issue pertaining to whether or not the overt act  
18 must be found, whether the evidence of the overt act must be  
19 found by unanimity. I looked at the case law. The Second  
20 Circuit case that the government pointed out is directly on  
21 point.

22 The Second Circuit there indicates that it is going to  
23 follow two other circuits, the Third and the Fifth, I believe,  
24 that ruled that you need not consider the agreement -- the  
25 language specifically says, "Although proof of at least one

D81nles3

1 overt act is necessary to prove an element of the crime, you  
2 need not reach unanimous agreement on which particular overt  
3 act was committed in furtherance of the conspiracy." That is  
4 what I read the Second Circuit to have ruled in the applicable  
5 case.

6 With regards to the materiality issue, I read the  
7 Second Circuit case that Mr. Rutigliano called our attention  
8 to. In fact, that Second Circuit case makes reference to and  
9 quotes from the Supreme Court case of 1999 that the government  
10 called to our attention pertaining to materiality, and  
11 consequently we used the Supreme Court language on that issue.

12 Finally, with respect to the occupational disability,  
13 on page 85 of the black-line I essentially made reference to  
14 the two definitions, having indicated that there is evidence in  
15 the record, testimony that made reference to both issues. I  
16 just define what they are. To the extent that there is also  
17 discussion about the railroad occupation, I leave the language  
18 pertaining to what it means under the statute, railroad  
19 occupation, but I delete the language that talks about the  
20 process and procedure of what the RRB does and what it gives  
21 weight to.

22 Those are the major changes.

23 Now, Mr. Ryan had submitted yet another formulation  
24 with regards to the statute of limitations issue. I looked at  
25 it. I am not persuaded that there is a sufficient basis for

D81nles3

1 any further instruction on that beyond what is adopted, which  
2 is essentially to indicate that the applicable statute of  
3 limitations for Counts Three and Four requires that the overt  
4 act must have occurred after December 18, 2006.

5 That is on page 56.

6 So we must bring closure to the matter, and that is  
7 the instructions as I have now revised them. You may or may  
8 not agree with the changes. If you do not, of course, you have  
9 the prerogative to express any further objections.

10 THE COURT: Mr. Dratel.

11 MR. DRATEL: Your Honor, I see that the Court did put  
12 in a defendant's theory of the case on 78.

13 THE COURT: Yes. I'm sorry. I should have called  
14 your attention to that.

15 What I tried to do there, rather than having three  
16 separate theories of the case, insofar as each defendant  
17 essentially has similar elements of a theory of defense, I put  
18 one generic one that pertains to all three, and then I follow  
19 that with the good-faith language.

20 MR. DRATEL: To the extent it wasn't clear before, we  
21 on behalf of Dr. Lesniewski join in the requests that were made  
22 by the other counsel for the other defendants as well. I guess  
23 I don't have to restate the objections on the overt act issue.  
24 We discussed that already.

25 THE COURT: All the objections have been recorded. If

D81nles3

1 there are any new ones to what I flagged for you here, you may  
2 express them at this point. I will give you one last  
3 opportunity to record any objections to the instructions after  
4 I read them, and that will be the end.

5 MR. DRATEL: Not on the instructions, your Honor, but  
6 there is something we noticed in the indictment, the redacted  
7 indictment.

8 THE COURT: Yes.

9 MR. DRATEL: If you look at page 2, paragraph 4, it  
10 includes the description of Steven Gagliano as if he's still a  
11 defendant. We think that that paragraph needs to be deleted.  
12 There are some references which, I think I found them all, but  
13 obviously a word search on an electronic copy would help. But  
14 page 22, paragraph E, his name is capitalized in one of the  
15 overt acts, on page 25 in the Counts Five Through Eight, Count  
16 Five has him capitalized as the retiree. The same with respect  
17 to page 22, he is named as a defendant in Count Seventeen and  
18 as the retiree.

19 So I think, as with those other retirees who are not  
20 defendants, where it properly shows up as the person who did  
21 the application, it should be lower case, you know, just like  
22 the others and remove that paragraph 4 and also have his name  
23 removed from Count Seventeen in terms of as a defendant.

24 THE COURT: Mr. Dratel, we don't give the jury the  
25 copy of the indictment until after the instructions.

D81nles3

1 MR. DRATEL: Right.

2 THE COURT: So we have a couple of hours.

3 MR. DRATEL: That is fine.

4 THE COURT: We need to work this thing out with the  
5 government and get a conformed copy that we can then send into  
6 the jury room.

7 MR. DRATEL: That's why I wanted to raise it now, so  
8 we don't waste time.

9 THE COURT: I appreciate that.

10 MR. DRATEL: Thank you.

11 THE COURT: If there is nothing else --

12 MR. DURKIN: Judge, have you made a final ruling on  
13 dismissing the juror?

14 THE COURT: Yes, I have. As I indicated, I don't want  
15 to do it here in open court.

16 MR. DURKIN: Could I just make one last stand on that  
17 so to speak?

18 THE COURT: I made the ruling yesterday, Mr. Durkin.  
19 You may recall when I made the ruling.

20 MR. DURKIN: I know.

21 THE COURT: I said that I was going to continue to  
22 document for the record, which I have, and I will share it with  
23 you those findings after I give the instructions and before I  
24 announce the alternates.

25 MR. DURKIN: Can I just be heard briefly then at that

D81nles3

1 time?

2 THE COURT: Yes.

3 MR. DURKIN: OK. That is fine.

4 THE COURT: All right.

5 MR. WEDDLE: Your Honor, I had one thing which I  
6 apologize for not noticing earlier. I mentioned this to  
7 Mr. Williams. In the second paragraph of your instruction, you  
8 mention that you are planning to lock the courtroom.

9 THE COURT: I lock the courtroom during the  
10 instructions for obvious reasons. I don't want to have people  
11 outside come in and out of the courtroom while I am giving the  
12 instructions because it is disruptive to the reporter. It may  
13 cause the reporter to miss something that I may have said.  
14 That has been the practice.

15 MR. WEDDLE: I was just concerned about it in light of  
16 the Second Circuit's fairly recent Gupta decision, which was an  
17 en banc decision, where the courtroom was locked during voir  
18 dire. Unbeknownst to the parties, the courtroom was closed  
19 during voir dire, and the Second Circuit reversed because the  
20 Court had not made findings under the Waller factors.  
21 Obviously this situation is different because in Gupta the  
22 defendants didn't know about it, and now they do know about it  
23 and none of them have raised an objection, so there would be a  
24 waiver.

25 THE COURT: Well, voir dire is entirely different from

D81nles3

1 court instructions, I think. So I don't think that locking the  
2 courtroom during court instructions would be covered by Gupta,  
3 but if you for the sake of belt and suspenders wish to invite  
4 any objections from any defendants to the Court locking the  
5 courtroom during the instructions, you may record them at this  
6 point.

7 MR. JACKSON: As long as you don't lock me out. I  
8 just have to go to the men's room.

9 THE COURT: These instructions are going to take at  
10 least two hours. If you have any business on the outside, you  
11 better take care of it now.

12 (Recess)

13 THE COURT: Bring in the jury, please.

14 (Continued on next page)  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25



D81nles3

1 (Jury present)

2 THE COURT: Welcome back. Thank you very much. My  
3 apologies again for keeping you waiting and for any  
4 inconvenience it may have caused. I indicated to you the other  
5 day that as we draw to the closing stages of the trial things  
6 become a little bit more unpredictable, and things come up  
7 which through nobody's fault cause these kinds of delays.

8 Before you begin your deliberations, I am going to  
9 instructs you on the law. You must pay very close attention,  
10 and I will be as clear as possible.

11 I take this opportunity to advise anyone in the  
12 courtroom, in the audience, in the back benches, that while I  
13 instruct the jury, the courtroom will be locked, and no one  
14 will be permitted to enter or leave the courtroom until I have  
15 concluded all my instructions to the jury. These instructions  
16 may take as much as two hours, or longer, so if you have any  
17 business on the outside this is the opportunity for you to step  
18 out.

19 It has been obvious to me and to counsel that until  
20 now you have been faithfully discharging your duty to listen  
21 carefully and to observe each witness who testified. Your  
22 interest never flagged, and you have followed the testimony  
23 with close attention. I ask you now to give me that careful  
24 attention as I instruct you on the law.

25 Now, listening on these instructions may not be easy.

D81nles3

## Jury Charge

1 It is important, however, that you listen carefully and  
2 concentrate, and I ask you to be patient and to pay close  
3 attention.

4 You will have a copy of my instructions that you can  
5 take with you into the jury room after I complete reading the  
6 instructions, so you need not take notes. It is more important  
7 for you to listen and not be distracted by note-taking at this  
8 point.

9 You have heard all of the evidence in the case as well  
10 as the final arguments of the lawyers for the parties.

11 My duty at this point is to instruct you on the law.  
12 It is your duty to accept these instructions of law and to  
13 apply them to the facts as you determine them, just as it has  
14 been my duty to preside over the trial and decide what  
15 testimony and evidence is relevant under the law for your  
16 consideration.

17 On these legal matters, you must take the law as I  
18 give it to you. If any attorney has stated a legal principle  
19 different from any that I state to you in these instructions,  
20 it is my instructions that you must follow. You must consider  
21 the law only as I instruct you, and you must disregard any  
22 contrary opinion of the relevant law that may be expressed by  
23 anyone else, including members of your panel. You are all  
24 instructed that if, by whatever means or authority, you have  
25 either heard or formed a view of the law relevant to this case

D81nles3

## Jury Charge

1 other than that now described to you by the Court in these  
2 instructions, you are not to discuss it with your fellow jurors  
3 during any part of this case or during your deliberations.  
4 This is very important.

5 You should not single out any one instruction as  
6 definitively stating the law alone, but you must consider my  
7 instructions as a whole when you retire to deliberate to the  
8 jury room.

9 You must not -- any of you -- be concerned with the  
10 wisdom of any rule of law that I state. Regardless of any  
11 opinion that you may have as to what the law may be, or ought  
12 to be, it would be violate your sworn duty to base your verdict  
13 upon any view of the law other than that which I give you.

14 As members of the jury, you are the sole and exclusive  
15 judges of the facts. You pass judgment on the evidence. You  
16 determine the credibility of the witnesses. You resolve such  
17 conflicts as there may be in the testimony. You draw whatever  
18 reasonable inferences you decide to draw from the facts as you  
19 have determined them.

20 I shall later discuss with you how to pass upon the  
21 credibility -- or believability -- of the witnesses.

22 In determining the facts, you must rely upon your own  
23 recollection of the evidence. What the lawyers have said in  
24 their opening statements, in their closing arguments, in their  
25 objections or in their questions is not evidence. Nor is

D81nles3

Jury Charge

1 anything I that may have said during the trial or may say  
2 during these instructions with respect to a fact matter to be  
3 taken in substitution for your own independent recollection of  
4 the facts. What I say in this regard is not evidence.

5 The evidence before you consists of the answers given  
6 by witnesses -- the testimony they gave, as you recall it --  
7 and the exhibits that were received in evidence. The evidence  
8 does not include the questions posed by the lawyers. Only the  
9 answers are evidence. But you may not consider any answer that  
10 I directed you to disregard or that I directed be struck from  
11 the record. Do not consider such answers.

12 You may also consider the stipulations of the parties  
13 as evidence.

14 In determining the facts, no one may invade your  
15 province or function as jurors. In order for you to determine  
16 the facts, you must rely upon your own recollection of the  
17 evidence. Any notes that were taken by jurors during the trial  
18 should only be used to refresh the recollection of the juror  
19 who took the notes. In addition, notes that you take may only  
20 be used to assist you and are not a substitute for your  
21 recollection of the evidence in the case. Keep in mind that  
22 just because you've written a note does not necessarily mean it  
23 is accurate. Along the same lines, the fact that a particular  
24 juror has taken notes does not entitle that juror's views to  
25 any greater weight than the views of any other juror. Again,

D81nles3

## Jury Charge

1 you are not required to take notes, but if you decide to do so,  
2 you may not discuss or share your notes with anyone else before  
3 or during deliberations. The notes that you took are for you  
4 alone.

5 I have not expressed nor have I intended to suggest  
6 any opinion as to which witnesses are or are not worthy of  
7 belief, what facts have or have not been established, or what  
8 inference or inferences should be drawn from the evidence. If  
9 any expression of mine has seemed to indicate an opinion  
10 relating to any of these matters, I instruct you to disregard  
11 it. You are, I repeat, the exclusive and sole judges of all of  
12 the questions of fact submitted to you and of the credibility  
13 of the witnesses.

14 Your authority, however, is not to be exercised  
15 arbitrarily. It must be exercised with good judgment, sound  
16 discretion and in accordance with the rules of law which I give  
17 you.

18 You are reminded that you took an oath to render  
19 judgment impartially and fairly and not to be swayed by  
20 prejudice, sympathy, or fear and to be guided solely by the  
21 evidence in the case and the applicable law. You must fulfill  
22 your oath in order to reach a just and true verdict. You are  
23 to perform the duty of finding the facts without bias or  
24 prejudice as to any party. You are to perform your final duty  
25 in an attitude of complete fairness and impartiality.

D81nles3

Jury Charge

1           The fact that the prosecution is brought in the name  
2 of the United States of America entitles the government to no  
3 greater consideration than that accorded to any other party to  
4 a litigation. By the same token, it is entitled to no less  
5 consideration. All parties, whether government or individuals,  
6 stand as equals at the bar of justice. The question before you  
7 can never be: Will the government win or lose the case? The  
8 government always wins when justice is done, regardless of  
9 whether the verdict is guilty or not guilty.

10           Before I instruct you on the specific issues that you  
11 must decide, I want to define for you the standard by which you  
12 will decide whether the government has met its burden of proof  
13 on a particular issue. This is a criminal case, and as such  
14 the government has the burden of proving all of the elements of  
15 each of the charges against each defendant beyond a reasonable  
16 doubt.

17           Although each defendant has been indicted, you must  
18 remember that an indictment is only an accusation. It is not  
19 evidence. Each defendant has pleaded not guilty to that  
20 indictment.

21           As a result of each defendant's pleas of not guilty,  
22 the burden is on the prosecution to prove guilt beyond a  
23 reasonable doubt. This burden never shifts to a defendant for  
24 the simple reason that the law never imposes upon a defendant  
25 in a criminal case the burden or duty of calling any witness or

D81nles3

Jury Charge

1 producing any evidence.

2 It is a cardinal principle of our system of justice  
3 that every person accused of a crime is presumed to be innocent  
4 unless and until his or her guilt is established beyond a  
5 reasonable doubt.

6 The presumption is not a mere formality. It is a  
7 matter of the most important substance. I therefore instruct  
8 that you the defendants, Peter Lesniewski, Marie Baran, and  
9 Joseph Rutigliano, are to be presumed by you to be innocent  
10 throughout your deliberations until such time, if ever, that  
11 you as a jury are satisfied that the government has proven him  
12 or her guilty beyond a reasonable doubt.

13 The defendants begin the trial with a clean slate.  
14 This presumption of innocence alone is sufficient to acquit a  
15 defendant unless you as jurors are unanimously convinced beyond  
16 a reasonable doubt of his or her guilt, after a careful and  
17 impartial consideration of all of the evidence in this case. A  
18 defendant has the right to remain silent and never has the  
19 burden to present any evidence or to prove that he or she is  
20 not guilty. If the government fails to sustain its burden as  
21 to any defendant and count that you are considering, you must  
22 find that defendant not guilty on that count.

23 The presumption of innocence was with the defendants  
24 when the trial began and remains with them even now as I speak  
25 to you and will continue with each defendant into your

D81nles3

Jury Charge

1 deliberations unless and until you are convinced that the  
2 government has proven his or her guilt beyond a reasonable  
3 doubt.

4 I have said that the government must prove each  
5 defendant guilty beyond a reasonable doubt. The question  
6 naturally is: What is a reasonable doubt? The words almost  
7 define themselves. It is a doubt based upon reason and common  
8 sense. It is a doubt that a reasonable person has after  
9 carefully weighing all of the evidence. It may arise from the  
10 evidence or the lack of evidence or the nature of the evidence.  
11 It is a doubt which would cause a reasonable person to hesitate  
12 to act in a matter of importance in his or her personal life.  
13 Proof beyond a reasonable doubt must, therefore, be proof of  
14 such a convincing character that a reasonable person would not  
15 hesitate to rely and act upon it in the most important of his  
16 or her own affairs. A reasonable doubt is not a caprice or  
17 whim; it is not a mere speculation or suspicion. It is not an  
18 excuse to void the performance of an unpleasant duty. And it  
19 is not sympathy.

20 In a criminal case the burden is at all times upon the  
21 government to prove guilt beyond a reasonable doubt. The law  
22 does not require that the government prove guilt beyond all  
23 possible doubt; proof beyond a reasonable doubt is sufficient  
24 to convict. This burden never shifts to a defendant, which  
25 means that it is always the government's burden to prove each



D81nles3

## Jury Charge

1 of the elements of each crime charged beyond a reasonable  
2 doubt.

3 If after fair and impartial consideration of all of  
4 the evidence, you are satisfied of a defendant's guilt beyond a  
5 reasonable doubt, you must vote to convict that defendant. On  
6 the other hand, if after fair and impartial consideration of  
7 all of the evidence, you have a reasonable doubt as to the  
8 guilt of a defendant, it is your duty -- and you must -- acquit  
9 that defendant.

10 In making your determinations of fact in the case,  
11 your judgment must be applied only to that which is properly in  
12 evidence.

13 I will now remind you of the preliminary instructions  
14 that I gave you at the start of the trial as to what you should  
15 consider as evidence, from which you are to decide what the  
16 facts are. The evidence in this case consists of:

17 The sworn testimony of witnesses, on both direct and  
18 cross-examination, regardless of who called the witness;

19 The documents and exhibits which have been admitted  
20 into evidence; and,

21 The facts to which all the lawyers have agreed to  
22 stipulated.

23 Again, nothing else is evidence -- not what the  
24 lawyers say, not what I say, and not anything you heard outside  
25 the courtroom.

D81nles3

Jury Charge

1           As I previously instructed, evidence is the witnesses'  
2 answers to the questions put to them, not the questions  
3 themselves. Arguments of counsel, no matter how passionate  
4 their appeal, are not evidence, although you may give  
5 consideration to those arguments in making up your mind as to  
6 what inferences to draw from the facts which are in evidence.  
7 What the lawyers have said to you in their opening statements  
8 and the closing arguments I repeat is not evidence. The  
9 closing arguments are designed to present to you what the  
10 parties believe the evidence has shown and what inferences they  
11 believe may reasonably be drawn from the evidence. If your  
12 recollection of the facts differs from the lawyers' statements,  
13 it is your recollection which controls. Similarly, the  
14 lawyers' characterization of the witnesses' testimony and  
15 assessment of credibility is not evidence. Only your own  
16 evaluation of the testimony and credibility should influence  
17 your deliberations.

18           You should only consider exhibits that have been  
19 admitted into evidence. Exhibits marked for identification but  
20 not admitted are not evidence, nor are materials brought forth  
21 only to refresh the recollection of any witnesses. You cannot  
22 consider or speculate as to the content of any exhibit not  
23 received in evidence.

24           Similarly, you are to disregard any testimony when I  
25 have ordered that it be stricken. As I indicated before, only

D81nles3

## Jury Charge

1 the witnesses' answers are evidence, and you are not to  
2 consider a question as evidence.

3 From time to time, the Court has been called upon to  
4 pass upon the admissibility of certain evidence, although I  
5 have tried to do so -- insofar as it was practicable -- out of  
6 your hearing. You should not be concerned with the reasons for  
7 any such rulings, and you are not to draw any inferences from  
8 them. Whether offered evidence is admissible is purely a  
9 question of law in the province of the Court and outside the  
10 province the jury.

11 In admitting evidence to which an objection has been  
12 made, the Court does not determine what weight should be given  
13 to such evidence, nor does it pass on the credibility of the  
14 evidence. Of course, you are required to dismiss from your  
15 mind completely any evidence which has been ruled out of the  
16 case by the Court, and you must refrain from speculation or  
17 conjecture or any guesswork about the nature or effect of any  
18 discussions between the Court and counsel held out of your  
19 hearing or presence.

20 It is the duty of the attorneys on each side of a case  
21 to object when the other side offers testimony or other  
22 evidence which the attorneys believe is not properly  
23 admissible. Counsel also have the right and duty to ask the  
24 Court to make rulings of law and to request conferences at the  
25 sidebar out of the hearing of the jury.

D81nles3

## Jury Charge

1 All of those questions of law must be decided by the  
2 Court. You are not to show any prejudice against an attorney  
3 or his or her client because the attorney objected to the  
4 admissibility of evidence or asked for a conference out of the  
5 hearing of the jury or asked the Court for a ruling on the law.

6 Recall also that in my preliminary instructions I  
7 described two kinds of evidence: Direct and circumstantial.

8 Direct evidence is when a witness testifies about  
9 something he or she knows by virtue of his or her own senses --  
10 something he or she has seen, felt, touched, or heard.

11 Circumstantial evidence is evidence which tends to  
12 prove a disputed fact by proof of other facts. You infer on  
13 the basis of reason and experience and common sense from one  
14 established fact the existence or nonexistence of some other  
15 fact. If someone walked into the courtroom wearing a raincoat  
16 covered with drops of water and carrying a wet umbrella, that  
17 would be circumstantial evidence from which you could conclude  
18 that it was raining outside.

19 Circumstantial evidence is of no less value than  
20 direct evidence; it is a general rule that the law makes no  
21 distinction between direct and circumstantial evidence, but  
22 simply requires that, before convicting a defendant, the jury  
23 must be satisfied of that defendant's guilt beyond a reasonable  
24 doubt from all of the evidence in the case.

25 During the trial, you may have heard me or the

D81nles3

## Jury Charge

1 attorneys use the term "inference." Inferences are deductions  
2 or conclusions which you, the jury, may reach, using reason,  
3 logic and common sense, based on facts which have been  
4 established by the evidence in the case.

5 You may draw from the facts that you find have been  
6 proved such reasonable inferences as seem justified in light of  
7 your experience. However, you should not treat your power to  
8 draw reasonable inferences as permission to indulge in  
9 conjecture, speculation, or guesswork. Every inference relied  
10 upon by the jury should be based on the evidence or lack of  
11 evidence in the case and drawn on the basis of reason, logic  
12 and common experience.

13 If you conclude that other persons may have been  
14 involved in criminal acts charged in the indictment, you may  
15 not draw any inference, favorable or unfavorable, towards the  
16 government or the defendants from the fact that such persons  
17 were not named as defendants in the indictment. Whether a  
18 person should be named as a coconspirator or indicted as a  
19 defendant is a matter within the sole discretion of the United  
20 States attorney and the grand jury. Therefore, you may not  
21 consider it in any way in reaching your verdict as to the three  
22 defendants on trial. Your task is limited to considering the  
23 charges contained in the indictment and the three defendants  
24 before you.

25 In this case you have heard evidence in the form of

D81nles3

Jury Charge

1 stipulations.

2 A stipulation of testimony is an agreement among the  
3 parties that, if called, a witness would have given certain  
4 testimony. You must accept as true the fact that the witness  
5 would have given the testimony. However, it is for you to  
6 determine the weight to be given that testimony.

7 You also heard evidence in the form of stipulations  
8 that contain facts that were agreed to be true. In such cases,  
9 you must accept those facts as true. However, it is it is for  
10 you to determine the weight to be given that fact.

11 (Continued on next page)

12

13

14

15

16

17

18

19

20

21

22

23

24

25

D81LLES4

Charge

1 THE COURT: Those facts.

2 You had the opportunity to observe all the witnesses.  
3 It is your job to decide how believable each witness was in his  
4 or her testimony. You are the sole judges of the credibility  
5 of each witness and of the importance of his or her testimony.

6 In determining where the truth lies, you should use  
7 all of the tests of truthfulness that I mentioned to you  
8 earlier -- those that you would use in determining matters of  
9 importance to you in your everyday life.

10 You should consider the opportunity the witness had to  
11 see, hear, and know the things about which they testified, the  
12 accuracy of their memory, their candor or lack of candor, their  
13 intelligence, the reasonableness and probability of its  
14 corroboration or lack of corroboration with other believable  
15 testimony and evidence.

16 You watched the witnesses. Everything a witness said  
17 or did on this witness stand counts in your determination. How  
18 did the witness appear? What was the witness's demeanor while  
19 testifying? Often it is not what people say but how they say  
20 it that moves us.

21 When considering the credibility of each witness, you  
22 may consider whether the witness is disposed to favor or  
23 disfavor one party or another. Bias, prejudice, or retaliatory  
24 motive may affect the witness's perception or recollection of  
25 events. It is important to bear the motive of a witness in

D81LLES4

Charge

1 mind when determining how much weight to give to his or her  
2 testimony.

3 Inconsistencies or discrepancies in the testimony of a  
4 witness, or between the testimony of different witnesses, may  
5 or may not cause you to discredit such testimony. Two or more  
6 persons witnessing an incident or a transaction or  
7 participating in the same conversation or meeting may see it,  
8 may see or hear it differently. Innocent failure of  
9 recollection is a common experience. In weighing the effect of  
10 a discrepancy, always consider whether it pertains to a matter  
11 of importance or an unimportant detail. Ask yourselves whether  
12 the discrepancy results from an innocent error, honest  
13 confusion, or intentional falsehood, and that may depend on  
14 whether it has to do with an important fact or with only a  
15 small detail.

16 After making your own judgment, you will give the  
17 testimony of each witness such weight, if any, as you think it  
18 deserves. You may accept or reject the testimony of any  
19 witness in whole or in part.

20 In other words, what you must try to do in deciding  
21 credibility is to size a witness up in light of his or her  
22 demeanor, the explanations given, and all of the other evidence  
23 or lack of evidence in the case. Always remember that you  
24 should use your common sense, your good judgment, and your life  
25 experience.



D81LLES4

Charge

1           The fact that one party called more witnesses and  
2 introduced more evidence than the other party does not mean  
3 that you should necessarily find the facts in favor of the side  
4 offering the most witnesses. By the same token, you should  
5 not -- you do not have to accept the testimony of any witness  
6 who has not been contradicted or impeached, if you find the  
7 witness not to be credible. You also have to decide which  
8 witnesses to believe and which facts are true. To do this you  
9 must look at all of the evidence, drawing upon your common  
10 sense and personal experience. After examining all the  
11 evidence or lack of evidence, you may decide that the party  
12 calling the most witnesses has not persuaded you because do you  
13 not believe its witnesses, or because you did believe the fewer  
14 witnesses called by the other side.

15           Keep in mind that the burden of proof is always on the  
16 government and a defendant is not required to call any  
17 witnesses or offer any evidence, since he or she is presumed to  
18 be innocent.

19           In evaluating credibility of witnesses, you should  
20 take into account any evidence that any witness who has  
21 testified may benefit in some way from the outcome of a case.  
22 Such an interest in the outcome creates a motive to testify  
23 falsely and may sway a witness to testify in a way that  
24 advances his or her own interest. Therefore, if you find that  
25 any witness whose testimony you are considering may have an

D81LLES4

Charge

1 interest in the outcome of the trial, then you should bear that  
2 factor in mind in evaluating the credibility of his or her  
3 testimony. You should not disregard or disbelieve that  
4 testimony simply because the witness has such an interest, but  
5 if you accept it, you should do so with great care.

6 This is not to suggest that every witness who has an  
7 interest in the outcome of a case will testify falsely. It is  
8 for you to decide to what extent, if at all, a witness's  
9 interest has affected or colored his or her testimony.

10 You have heard the testimony of law enforcement  
11 officials and employees of the government. The fact that a  
12 witness has or may be employed as a law enforcement official or  
13 employee does not mean that his or her testimony is necessarily  
14 deserving of more or less consideration or greater or lesser  
15 weight than that of an ordinary witness.

16 It is your decision, after reviewing all of the  
17 evidence or lack of evidence, whether to accept the testimony  
18 of the law enforcement or government employee witness and to  
19 give to that testimony the weight you find it deserves.

20 One defendant has testified in this case and two have  
21 not. A defendant in a criminal case never has any duty to  
22 testify or come forward with any evidence. This is because, as  
23 I have told you, the burden of proof beyond a reasonable doubt  
24 remains on the government at all times, and each defendant is  
25 presumed innocent. In this case, a defendant did testify and

D81LLES4

Charge

1 she was subject to cross-examination like any other witness.  
2 You should examine and evaluate her testimony just as you would  
3 the testimony of any other witness with an interest in the  
4 outcome of the case.

5 You may not attach any significance to the fact that a  
6 defendant did not testify. No adverse inference against him  
7 may be drawn because he did not take the witness stand. You  
8 may not consider this against a defendant in any way in your  
9 deliberations in the jury room.

10 There are several persons whose names you have heard  
11 during the course of the trial but who did not appear here to  
12 testify, and as to whom there was no stipulation about what  
13 they would testify if they appeared. I instruct you that each  
14 body had an equal opportunity or lack of opportunity to draw --  
15 to call any of these witnesses. Therefore, you should not draw  
16 any inferences or reach any conclusions as to what they would  
17 have testified to had they been called. Their absence should  
18 not affect your judgment in any way.

19 Thus, for example, you have heard testimony regarding  
20 Peter Ajemian. I instruct you that he was not available as a  
21 witness to any party. You should not speculate about why he  
22 was not available. Nor should you draw any inferences,  
23 favorable or unfavorable, towards the government or the  
24 defendants because he did not testify. You must decide the  
25 case based upon the evidence before you, not upon speculation.

D81LLES4

Charge

1           You should, however, remember my instruction that the  
2 law does not impose on a defendant in a criminal case the  
3 burden or duty of calling any witnesses or producing any  
4 evidence.

5           You should remember that there is no duty on either  
6 side to call a witness whose testimony would be merely  
7 cumulative of the testimony already in evidence, or who would  
8 merely provide additional testimony of facts already in  
9 evidence.

10          You have heard reference in the form of arguments of  
11 defense counsel in this case to the fact that certain  
12 investigative techniques were used by the government and  
13 certain other investigative techniques were not. There is no  
14 requirement of the government to prove its case through any  
15 particular means. While you are to consider carefully the  
16 evidence adduced by the government, you need not speculate as  
17 to why they used the techniques they did or why they did not  
18 use other techniques. The government is not on trial, and law  
19 enforcement techniques are not your concern.

20          Your concern is to determine whether or not, on the  
21 evidence or lack of evidence, each defendant's guilt has been  
22 proved beyond a reasonable doubt.

23          Some of the exhibits in this case are charts and  
24 summaries. These charts and summaries were admitted merely as  
25 analysis and summaries of documents previously admitted or

D81LLES4

Charge

1 certain testimony previously heard, and in some instances, to  
2 set forth in detail the conclusions on calculations that  
3 witnesses such as Robert Murray or Natasha Marx summarized  
4 orally. These charts and summaries are offered to assist you  
5 as visual or organizational aides. They're not, however,  
6 themselves direct evidence of the transactions. They are  
7 graphic demonstrations of the underlying testimony and  
8 documents. Thus, it is the underlying evidence that determines  
9 what weight, if any, these charts and summaries deserve. It is  
10 for you to decide whether the charts and summaries correctly  
11 present the information contained in the testimony and exhibits  
12 upon which they are based. It is also for you to decide what  
13 weight to give the underlying evidence. You are entitled to  
14 consider the charts and summaries if you find that they assist  
15 you in analyzing and understanding the evidence.

16 We have, among the exhibits received in evidence, some  
17 documents that are redacted. Redacted means that part of the  
18 document is taken out. You are to concern yourself only with  
19 the part of the item that has been admitted into evidence. You  
20 should not consider any possible reason why the other part of  
21 it has been deleted.

22 You heard, you have heard witnesses who testified that  
23 they were actually involved in the planning and carrying out  
24 the crimes charged in the indictment. There's been a great  
25 deal said about these accomplice witnesses in the summaries of

D81LLES4

Charge

1 counsel and about whether you should believe them.

2 Experience will tell you that the government  
3 frequently must rely on the testimony of witnesses who admit  
4 participating in the alleged crimes at issue. The government  
5 must take its witnesses as it finds them and frequently it must  
6 use such testimony in a criminal prosecution, because otherwise  
7 it would be difficult or impossible to detect and prosecute  
8 wrongdoers. A guilty plea of witnesses is not evidence of a  
9 defendant's guilt.

10 You may properly consider the testimony of such  
11 accomplices. If accomplices could not be used, there would be  
12 many cases in which there was real guilt and conviction should  
13 be had, but in which convictions would not be obtainable.

14 Indeed, it is the law in the federal courts that the  
15 testimony of a single accomplice witness may be enough in  
16 itself for conviction, if the jury believes the testimony and  
17 establishes the guilt beyond a reasonable doubt.

18 However, because of the possibility that an accomplice  
19 may have an interest in or may derive a benefit from  
20 testifying, an accomplice witness's testimony should be  
21 scrutinized with special care and caution. The fact that a  
22 witness is an accomplice can be considered by you as bearing on  
23 his or her credibility. It does not follow, however, that  
24 simply because a person has admitted participating in one or  
25 more crimes that he or she isn't capable of giving a truthful

D81LLES4

Charge

1 account of what happened.

2 Like the testimony of any other witness, accomplice  
3 witness testimony should be given such weight as it deserves in  
4 light of the facts and circumstances before you, taking into  
5 account the witness's demeanor and candor, the strength and  
6 accuracy of his or her recollection, background, and the extent  
7 to which the testimony is or is not corroborated by other  
8 evidence in the case.

9 You may consider whether an accomplice witness -- like  
10 any other witness called in the case -- has an interest or may  
11 derive a benefit, and if so, whether it has affected his or her  
12 testimony.

13 You heard testimony about an agreement between the  
14 government and the witness. I caution you that it is of no  
15 concern of yours why the government made an agreement with a  
16 witness. Your sole concern is whether the witness has given  
17 truthful testimony here in this courtroom before you.

18 In evaluating the testimony of accomplice witnesses,  
19 you should ask yourselves whether these witnesses would benefit  
20 more by lying or by telling the truth. Was it -- was his or  
21 her testimony made up in any way because he or she believed or  
22 hoped that he or she would somehow receive favorable treatment  
23 by testifying falsely? Or did he or she believe that her  
24 interests would be best served by testifying truthfully? If  
25 you believe that the witness was motivated by hopes of personal

D81LLES4

Charge

1 gain, was the motivation one that would cause him or her to  
2 lie, or was it one that would cause him or her to tell the  
3 truth? Did this motivation color his or her testimony?

4 If you find that the witness -- that the testimony was  
5 false, you should reject it. However, if after cautious and  
6 careful examination of an accomplice witness's testimony and  
7 demeanor on the witness stand you are satisfied that the  
8 witness told the truth, you should accept it as credible and  
9 act upon it accordingly.

10 As with any witness, let me emphasize that the issues  
11 of credibility need not be decided in an all-or-nothing  
12 fashion. Even if you find that a witness testified falsely in  
13 one part, you still may accept his or her testimony in other  
14 parts or may disregard it, disregard all of it. That is a  
15 determination entirely for you.

16 You have heard testimony that a defendant has a good  
17 reputation for honesty in the community where she lives and for  
18 truthfulness. Along with all other evidence you have heard,  
19 you may take into consideration the evidence and testimony  
20 about the honesty and truthfulness of the defendant when you  
21 decide whether the government has proven, beyond a reasonable  
22 doubt, that the defendant committed the crimes with which he  
23 has been charged.

24 You have heard evidence during the trial that  
25 witnesses have discussed the facts of the case and their



D81LLES4

Charge

1 testimony with the lawyers before the witnesses appeared in  
2 court.

3           Although you may consider that fact when you are  
4 evaluating a witness's credibility, I should tell you that  
5 there is nothing either unusual or improper about a witness  
6 meeting with lawyers before testifying so that the witness can  
7 be aware of the subjects he or she will be questioned about,  
8 focus on those subjects and have the opportunity to review  
9 relevant exhibits before being questioned about them. Such  
10 consultation helps conserve your time and the Court's time. In  
11 fact, it would be unusual for a lawyer to call a witness  
12 without such consultation.

13           Again, the weight you give to the fact that or nature  
14 of the witness's preparation for his or her testimony and what  
15 inferences you draw from such preparation are matters  
16 completely within your discretion.

17           Your verdict must be based solely upon the evidence  
18 developed at trial or the lack of evidence. It would be  
19 improper for you to consider in reaching your decision as to  
20 whether the government has sustained its burden of proof any  
21 personal feelings you may have about each defendant's race,  
22 religion, national origin, sex or age. Similarly, it would be  
23 improper for you to consider any personal feelings you may have  
24 about the race, religion, national origin, sex, or age of any  
25 of the witnesses or anyone else involved in this case. The

D81LLES4

Charge

1 defendants are entitled to a trial free from prejudice and our  
2 judicial system cannot work unless you reach your verdict  
3 through a favor and impartial consideration of the evidence.

4 It would be equally improper for you to allow any  
5 feelings you may have about the nature of the crimes charged to  
6 interfere with your decision-making process.

7 To repeat, your verdict must be based exclusively upon  
8 the evidence or lack of evidence in the case.

9 Under your oath as jurors, you're not to be swayed by  
10 sympathy. You're to be guided solely by the evidence in this  
11 case, and the crucial question that you must ask yourselves as  
12 you sift through the evidence is: Has the government proven  
13 the guilt of each of each defendant beyond a reasonable doubt?

14 It is for you alone to decide whether the government  
15 has proven that the defendants are guilty of the crimes  
16 charged, solely on the basis of the evidence and subject to the  
17 law as I charge you. It must be clear to you that once you let  
18 fear or prejudice or bias or sympathy interfere with your  
19 thinking, there is a risk that you will not arrive at a true  
20 and just verdict.

21 Therefore, if you should find that the government has  
22 met its burden of proving a defendant's guilt beyond a  
23 reasonable doubt, you should not hesitate because of any other  
24 reason to render a verdict of guilty as to that defendant. But  
25 on the other hand, if you have a reasonable doubt as to the

D81LLES4

Charge

1 defendant's guilt, you should not hesitate for any reason to  
2 find a verdict of not guilty as to that defendant.

3 Under your oath as jurors, you cannot allow a  
4 consideration of possible punishment that may be imposed upon a  
5 defendant, if convicted, to influence you in any way or in any  
6 sense to enter into your deliberations. The duty of imposing  
7 sentence is mine and mine alone. Your function to weigh the  
8 evidence and to determine whether the government has proved  
9 beyond a reasonable doubt that each defendant is or is not  
10 guilty upon the basis of the evidence and the law.

11 Therefore, I instruct you not to consider punishment  
12 or possible punishment in any way in your deliberations in this  
13 case.

14 You are obliged under your oath as jurors to follow  
15 the law as I instruct you, whether you agree or disagree with  
16 the particular law in question.

17 Proof of motive is not necessary, a necessary element  
18 of the crimes with which the defendants are charged. Proof of  
19 motive does not establish guilt, nor does a lack of proof of  
20 motive establish that a defendant is not guilty. If the guilt  
21 of a defendant is shown beyond a reasonable doubt, it is  
22 immaterial what that defendant's motive for the crime may be,  
23 or whether his or her motive was shown at all. The presence or  
24 absence of motive is, however, a circumstance which you may  
25 consider as bearing on the intent of a defendant.

D81LLES4

Charge

1           Certain evidence that was admitted at trial related to  
2 acts that are not themselves part of the charged crime. In  
3 particular, I am referring to the evidence admitted about  
4 whether certain defendants properly reported on their tax  
5 returns income that they received from the charged crimes. Let  
6 me remind you that none of the defendants is on trial for  
7 offenses relating to tax returns. Accordingly, you may not  
8 consider evidence relating to their tax returns as a substitute  
9 for proof that a defendant committed the crimes charged against  
10 him or her. Nor may you consider this evidence as proof that a  
11 defendant has a criminal personality or bad character. The  
12 evidence of the other acts has been admitted for a much more  
13 limited purpose and you may consider it only for that limited  
14 purpose.

15           With regard to Ms. Baran, at the time this evidence  
16 was introduced, I gave you a limiting instruction that the tax  
17 return evidence was admitted for a limited purpose and may be  
18 considered by you only as it bears upon Ms. Baran's intent,  
19 knowledge, motive, opportunity, absence of mistake, or  
20 accident, as to the acts that were alleged against her in the  
21 indictment.

22           With regards to Mr. Rutigliano, the government argues  
23 that the tax return evidence bears not only on his intent,  
24 knowledge, motive, opportunity, absence of mistake, or  
25 accident, but as a basis for a finding that he committed the

D81LLES4

Charge

1 act of defrauding the United States Railroad Retirement Board,  
2 or the RRB, by failure to report to the RRB the income that the  
3 government contends he derived from his consulting services.  
4 You may consider this evidence for this purpose as to  
5 Mr. Rutigliano if you find that he did receive such income and  
6 failed to report it to the Internal Revenue Service.

7 If you determine that a defendant committed the acts  
8 charged in the indictment and the similar acts as well, then  
9 you may, but you need not, draw an inference that in doing the  
10 acts charged in the indictment that defendant acted knowingly  
11 and intentionally and not because of some mistake, accident or  
12 other innocent reason.

13 Evidence of similar acts may not be considered by you  
14 for any other purpose. Specifically, you may not use this  
15 evidence to conclude that because a defendant committed the  
16 other act or acts, he must also have committed the acts charges  
17 in the indictment.

18 You have heard testimony from Dr. Alton Barron, who  
19 testified as an expert. An expert is allowed to express his  
20 opinion as to matters about which he has special knowledge and  
21 training. Expert testimony is presented to you on the theory  
22 that someone who is experienced in the field can assist you in  
23 understanding the evidence and in reaching an independent  
24 decision on the facts.

25 In weighing the expert's testimony, you may consider

D81LLES4

Charge

1 the expert's qualifications, his opinions, his reasons for  
2 testifying, as well as all of the other considerations that  
3 ordinarily apply when you're deciding whether or not to believe  
4 a witness's testimony. You may give the expert testimony  
5 whatever weight, if any, you find it deserves in light of all  
6 of the evidence in the case. You should not, however, accept  
7 any of the witnesses' testimony merely because they are  
8 experts. Nor should you substitute it for your own reason,  
9 judgment, and common sense. The determination of the facts in  
10 this case rests solely with you. In addition, you must follow  
11 my instructions on the law. To the extent my instructions  
12 differ from an expert's view of the law, you should disregard  
13 the expert's view of the law and follow my instructions.

14 With these instructions in mind, let us turn to the  
15 charges against the defendants as contained in the indictment.  
16 As I instructed you at the outset of the case, the indictment  
17 is a charge or accusation. It is not evidence. The indictment  
18 in this case contains 21 counts and names three defendants who  
19 are on trial together. In reaching a verdict, however, you  
20 must bear in mind that you must consider each defendant in each  
21 count individually with respect to whether the government has  
22 proved its case beyond a reasonable doubt. Your verdict as to  
23 each defendant on each count must be determined separately with  
24 respect to him or her, solely on the evidence or lack of  
25 evidence presented against him or her, without regard to

D81LLES4

Charge

1 whether anyone else is guilty or not guilty.

2 In addition, some of the evidence in this case was  
3 limited to one defendant. Let me emphasize that any evidence  
4 admitted solely against one defendant may be considered only as  
5 against that defendant and may not in any respect enter into  
6 your deliberations on any other defendant.

7 I will now summarize the offenses charged in the  
8 indictment, and then I will explain in detail the elements of  
9 the offenses for you.

10 The defendants, Peter J. Lesniewski, Marie Baran, and  
11 Joseph Rutigliano, are formally charged in an indictment. As I  
12 instructed you at the outset of the case, the indictment is a  
13 charge or accusation. The indictment contains 21 separate  
14 counts.

15 First, Count One of the indictment charges all three  
16 defendants with conspiring to commit mail fraud, wire fraud,  
17 and healthcare fraud based on their alleged participation in a  
18 scheme to defraud the RRB by obtaining disability benefits for  
19 Long Island Railroad retirees by means of false and fraudulent  
20 applications and supporting material, and to defraud private  
21 healthcare insurers by billing for unnecessary medical visits  
22 and tests.

23 Count Two charges defendants Marie Baran and Joseph  
24 Rutigliano with participating in a conspiracy to commit mail  
25 fraud, wire fraud, and healthcare fraud with another doctor who

D81LLES4

Charge

1 is not here on trial -- Peter Ajemian -- based on their alleged  
2 participation in the same kind of scheme to defraud the RRB and  
3 private health insurers, using the same methods described in  
4 Count One.

5 Count Three charges all three defendants with  
6 conspiring to defraud the United States, and specifically the  
7 RRB, again through the same kind of scheme.

8 Count Four charges the defendants Marie Baran and  
9 Joseph Rutigliano with conspiracy, together with Peter  
10 Ajemian -- who I remind you again is not on trial here -- to  
11 defraud the RRB through the same kind of scheme.

12 Counts Five through Eight charge different defendants  
13 or a combination of defendants with committing healthcare fraud  
14 in connection with the scheme. These defendants are also  
15 charged with aiding and abetting the commission of this crime.

16 Counts Nine through Thirteen charge different  
17 defendants or combination of defendants with committing mail  
18 fraud in connection with the scheme. These defendants are also  
19 charged with aiding and abetting the commission of this crime.

20 Counts Fourteen through Twenty charge different  
21 defendants or a combination of defendants with committing wire  
22 fraud in connection with the scheme. These defendants are also  
23 charged with aiding and abetting the commission of this crime.

24 Count Twenty-One charges Joseph Rutigliano with making  
25 a false and fraudulent statement to the United States, namely,



D81LLES4

Charge

1 Rutigliano is charged, Mr. Rutigliano is charged with falsely  
2 informing the RRB that he had not worked or been self-employed  
3 while he was receiving disability benefits.

4 As I mentioned earlier, Count One of the indictment  
5 charges all three defendants with conspiring to commit mail  
6 fraud, wire fraud, and healthcare fraud. More details as to  
7 Count One can be found in the indictment, which as I indicated  
8 you will have a copy, in paragraphs 27 through 30. Count Two  
9 charges the defendants Marie Baran and Joseph Rutigliano with  
10 participating in a conspiracy to commit mail fraud, wire fraud,  
11 and healthcare fraud with another doctor who is not here on  
12 trial -- Peter Ajemian. Again, more detail as to Count Two can  
13 be found in paragraphs 37 through 40 of the indictment.

14 A conspiracy is a kind of criminal partnership -- an  
15 agreement of two or more persons to join together to accomplish  
16 some unlawful purpose.

17 The crime of conspiracy -- or agreement -- to violate  
18 a federal law, as charged in Counts One and Two of the  
19 indictment, is an independent offense. It is separate and  
20 distinct from the actual violation of any specific federal  
21 laws, which is the law -- which the law refers to as a  
22 substantive crime.

23 Indeed, you may find a defendant guilty of the crime  
24 of conspiracy even if you find that the substantive crime which  
25 was the object of the conspiracy was never actually

D81LLES4

Charge

1 committed -- that is, the agreement did not succeed in its  
2 goal, and there was no actual mail fraud, wire fraud, or  
3 healthcare fraud committed. Congress has deemed it appropriate  
4 to make conspiracy, standing alone, a separate crime, even if  
5 the conspiracy is not successful.

6 In order to satisfy its burden of proof, the  
7 government must establish each of the following two essential  
8 elements beyond a reasonable doubt. Again, this pertains to  
9 Counts One and Two, the conspiracy count.

10 First, that two or more persons entered the unlawful  
11 agreement charged in the indictment; and

12 Second, that the defendant knowingly and willfully  
13 became a member of the conspiracy.

14 Starting with the first element, what is a conspiracy?  
15 As I mentioned just a few minutes ago, a conspiracy is an  
16 agreement or an understanding between two or more persons to  
17 accomplish by joint action a criminal or unlawful purpose. In  
18 this instance, the unlawful purpose alleged to be the object of  
19 the conspiracy charged in Counts One and Two is mail fraud,  
20 wire fraud, or healthcare fraud.

21 The gist, or the essence, of the crime of conspiracy  
22 is the unlawful agreement between two or more persons to  
23 violate the law. As I mentioned earlier, the ultimate success  
24 of the conspiracy, or the actual commission of the crime that  
25 is the object of the conspiracy, is not required.

D81LLES4

Charge

1           The conspiracy alleged here, therefore, is an  
2       agreement to engage in mail fraud, wire fraud, or healthcare  
3       fraud. Now, to show a conspiracy, the government is not  
4       required to show that two or more people sat around a table and  
5       entered into a solemn pact, orally or in writing, stating that  
6       they had formed a conspiracy to violate the law and spelling  
7       out all of the details. Common sense tells you that when  
8       people agree to enter into a criminal conspiracy, much is left  
9       to the unexpressed understanding. It is rare that a conspiracy  
10      can be proven by direct evidence of an explicit agreement.

11           In order to show that a conspiracy existed, the  
12      evidence must show that two or more persons, in some way or  
13      manner, either explicitly or implicitly, came to an  
14      understanding to violate the law and to accomplish an unlawful  
15      plan.

16           In determining whether there has been an unlawful  
17      agreement as alleged in the indictment, you may consider the  
18      actions of all of the alleged conspirators -- coconspirators  
19      that were taken to carry out the apparent criminal purpose.  
20      The old adage, "actions speak louder than words," applies here.  
21      Sometimes, the only evidence that is available with respect to  
22      the existence of a conspiracy is that of disconnected acts on  
23      the part of the alleged individual coconspirators. When all  
24      are taken together and considered as a whole, however, that  
25      conduct may warrant the inference that a conspiracy existed

D81LLES4

Charge

1 just as conclusively as more direct proof, such as evidence of  
2 an express agreement.

3 So, you must first determine whether or not the proof  
4 established beyond a reasonable doubt the existence of the  
5 conspiracy charged in the indictment. In considering the this  
6 first element, you should consider all of the evidence that has  
7 been admitted with respect to the conduct and statements of  
8 each of the alleged coconspirators, and any inferences that may  
9 be reasonably drawn from that conduct and those statements. It  
10 is sufficient to establish the existence of the conspiracy, as  
11 I just said, if, from the proof of all the relevant facts and  
12 circumstances, you find beyond a reasonable doubt, beyond a  
13 reasonable doubt that the minds of at least two alleged  
14 coconspirators met in an understanding way to accomplish the  
15 objective of the conspiracy charged in the indictment.

16 In this case, the defendants are charged with  
17 conspiring to accomplish an illegal objective, that is, to  
18 engage in mail fraud, wire fraud or healthcare fraud. If the  
19 government fails to prove that this was the object of the  
20 conspiracy in which the defendants participated, then you must  
21 find the defendants not guilty of the conspiracy count.

22 However, if you find that the defendants, any of the  
23 defendants did agree with another person to accomplish the  
24 objective of mail fraud, wire fraud, or healthcare fraud, then  
25 you may find that defendant guilty of conspiracy if you find

D81LLES4

Charge

1 the other elements of the crime satisfied.

2 Second, if you conclude that the government has proved  
3 beyond a reasonable doubt that the conspiracy charged in the  
4 indictment existed, you must determine next the second  
5 question: Whether the defendant you are considering  
6 participated in the conspiracy with knowledge of its unlawful  
7 purpose and in furtherance of its unlawful objective.

8 The government must prove beyond a reasonable doubt  
9 that the defendant you are considering knowingly and  
10 intentionally entered into the conspiracy with a criminal  
11 intent -- that is, with a purpose to violate the law -- and  
12 that that defendant agreed to take part in the conspiracy to  
13 promote and cooperate in the unlawful objective. In Count One  
14 and Count Two, the defendants charged in that count, the  
15 defendants are charged with conspiring to accomplish three  
16 illegal objectives. The first object the defendants are  
17 alleged to have agreed to accomplish is to commit mail fraud.  
18 The second object the defendants are alleged to have agreed to  
19 accomplish is to commit wire fraud, and the third object is to  
20 commit healthcare fraud.

21 It is not necessary for you to find that a charged  
22 conspiracy embodied all of these unlawful objectives. It is  
23 sufficient if you find that the government has proved beyond a  
24 reasonable doubt that conspirators agreed, expressly or  
25 impliedly, on any one of the objectives -- to commit, that is,

D81LLES4

Charge

1 to commit mail fraud, to commit wire fraud, or to commit  
2 healthcare fraud. An agreement to accomplish any one of these  
3 objectives is sufficient. However, in order to find the  
4 defendant you are considering guilty you must find you must all  
5 agree on at least one specific unlawful object charged, and you  
6 must agree on the same object.

7 The terms "unlawfully" and "intentionally" and  
8 "knowingly" are intended to ensure that if you find that the  
9 defendant you are considering did join in the conspiracy, you  
10 also conclude beyond a reasonable doubt that in doing so, he or  
11 she knew what he or she was doing; in other words, that he or  
12 she took the actions in question the actions in question  
13 deliberately and voluntarily.

14 An act is done "knowingly" and "intentionally" if it  
15 is done deliberately and purposely; that is, the defendant's  
16 acts must have been the product of the defendant's conscious  
17 objective, rather than the product of a mistake, accident, or  
18 mere negligence or some innocent reason.

19 "Unlawfully" simply means contrary to law. The  
20 defendant you are considering need not have known that he or  
21 she was breaking any particular law, but he or she must have  
22 been aware of the generally unlawful nature of his or her acts.

23 Now, science has not yet devised a manner of looking  
24 into a person's mind and knowing what the person is thinking.  
25 However, you do have before you evidence of certain acts and

D81LLES4

Charge

1 conversations alleged to have been taking place with the  
2 defendants. The government contends that each -- that these  
3 acts or conversations show beyond a reasonable doubt the  
4 defendant's knowledge of and participation in the alleged  
5 purpose, unlawful purpose of the conspiracy.

6 The defendants deny they were a member of any  
7 conspiracy. It is for you to determine whether the government  
8 has established beyond a reasonable doubt that such knowledge  
9 and intent on the part of the defendants existed.

10 It is not necessary for the government to show that  
11 the defendants were fully informed of all of the details of the  
12 conspiracy in order for you to infer knowledge. To have guilty  
13 knowledge, a defendant need not know all of the extent -- need  
14 not know the full extent of the conspiracy, or all the  
15 activities of its participants. It is not even necessary for a  
16 defendant to know every other member of the conspiracy. In  
17 fact, a defendant may know only one member of the conspiracy  
18 and still be a coconspirator. Nor is it necessary that a  
19 defendant receive any monetary benefit from participating in  
20 the conspiracy or have a financial stake in its outcome, so  
21 long as he or she participated in the conspiracy in the manner  
22 I have explained. Please keep in mind that it is enough if he  
23 or she participated in the conspiracy unlawfully, intentionally  
24 and knowingly, as I have defined those terms.

25 The duration of a defendant's participation has no

D81LLES4

Charge

1 bearing on the issue of the defendant's guilt. He or she need  
2 not have joined a conspiracy at the outset. He or she may have  
3 joined it at any time in its progress, and he or she will still  
4 be held responsible for all that was done before he or she  
5 joined and all that was done during the conspiracy's existence  
6 while he or she was a member. Each member of a conspiracy may  
7 perform separate and distinct acts. Some conspirators play  
8 major roles, while others play minor roles in the scheme. An  
9 equal role is not what the law requires. In fact, even a  
10 single act may be sufficient to draw a defendant within the  
11 scope of a conspiracy.

12           However, I want to caution you that a person's mere  
13 association with a member of the conspiracy does not make that  
14 person a member of the conspiracy, even when that association  
15 is coupled with knowledge that a conspiracy is taking place.  
16 Mere presence at the scene of a crime when coupled, even when  
17 coupled with knowledge that a crime is taking place is not  
18 sufficient to support a conviction. In other words, knowledge  
19 without agreement and participation is not sufficient.

20           What is necessary is that the defendant you are  
21 considering participated in the conspiracy with knowledge of  
22 its unlawful purpose and with an intent to aid in the  
23 accomplishment of its unlawful objective. In this case, the  
24 government alleges that the object of the conspiracy was to  
25 commit fraud. So to find any of the defendants guilty, you



D81LLES4

Charge

1 must find that he or she knew that the object of the conspiracy  
2 was to commit mail fraud, wire fraud, or healthcare fraud.

3 The defendant you are considering, with an  
4 understanding of the unlawful nature of the conspiracy, must  
5 have intentionally engaged, advised, or assisted in the  
6 conspiracy for the purpose of furthering an unlawful  
7 undertaking. That defendant therefore becomes a knowing and  
8 willing participant in the unlawful agreement -- that is to  
9 say, a conspirator.

10 A conspiracy, once formed, is presumed to continue  
11 until either its objective is accomplished or there is some  
12 affirmative act of termination by its members. So, too, once a  
13 person is found to be a member of a conspiracy, he or she is  
14 presumed to continue membership in the conspiracy until its  
15 termination, unless it is shown by some affirmative proof that  
16 he or she withdrew and disassociated himself or herself from  
17 it.

18 Finally, you must find that either the agreement was  
19 formed or that an act in furtherance of the conspiracy was  
20 committed in the Southern District of New York, which includes  
21 the borough of Manhattan. I will later provide you with a more  
22 detailed instruction regarding the boundaries of the Southern  
23 District of New York as it relates to the proper venue in this  
24 case.

25 I have now instructed you on the elements of Count One

D81LLES4

Charge

1 and Two, but before we move on, let me briefly touch on a few  
2 additional issues relating to the conspiracy charges.

3 The indictment states that a conspiracy existed from  
4 at from at least on or about the 1990s and up to and including  
5 on or about 2011. As I mentioned before, it is not essential  
6 that the government prove that the conspiracy started and ended  
7 on any specific dates. It is sufficient if you find that the  
8 conspiracy was formed and existed for some time around the  
9 dates set forth in the -- the dates set forth in the  
10 indictment.

11 This is also a good opportunity to instruct you that  
12 it does not matter if a specific event or transaction is  
13 alleged to have occurred on or about a certain date and the  
14 evidence indicates that it in fact occurred on another date.  
15 The law requires only a substantial similarity between the  
16 dates alleged in the indictment and the date established by the  
17 testimony and other evidence.

18 Also, let me briefly discuss how you should consider  
19 the acts and statements of coconspirators. You will recall  
20 that I have admitted at this trial evidence of the statements  
21 of various individuals because they are persons who the  
22 government claims were also confederates or coconspirators of  
23 the defendants.

24 The reason for allowing this evidence to be received  
25 against the defendants has to do with the nature of the crime

D81LLES4

Charge

1 of conspiracy. As I have said, a conspiracy is often referred  
2 to as a partnership in crime. As in other types of  
3 partnerships, when people enter into a conspiracy to accomplish  
4 an unlawful end, each and every member becomes an agent for the  
5 other conspirators in carrying out the conspiracy.

6 Therefore, the reasonably foreseeable acts or  
7 statements of any member of the conspiracy, committed in  
8 furtherance of the common purpose of the conspiracy, are  
9 deemed, under the law, to be acts or statements of all of the  
10 members, and all of the members are responsible for such acts  
11 or statements.

12 If you find beyond a reasonable doubt that the  
13 defendant you are considering was a member of the conspiracy  
14 charged in the indictment, then any acts done or statements  
15 made in furtherance of the conspiracy by a person also found by  
16 you to have been a member of the same conspiracy may be  
17 considered against the defendant you are considering. This is  
18 so even if the acts were committed or such statements were made  
19 in the defendant's absence, in that defendant's absence, and  
20 without that defendant's knowledge.

21 However, before you consider the acts or statements of  
22 a coconspirator in deciding the guilt of the defendant you are  
23 considering, you must first determine that the acts were  
24 committed or statements were made during the existence or in  
25 furtherance of the unlawful scheme. If the acts were done or

D81LLES4

Charge

1 the statements were made by someone whom you do not find to  
2 have been a member of the conspiracy, or if they were not in  
3 furtherance of the conspiracy, they may not be considered by  
4 you in deciding whether the defendant you are considering is  
5 guilty or not guilty of the count.

6 That finishes the elements of the conspiracies charged  
7 in Counts One and Two. As I've told you earlier, Counts Three  
8 and Four are also conspiracy counts, but they involve a  
9 conspiracy to defraud the United States and an agency thereof  
10 in violation of Title 18, United States Code, Section 371.

11 That statute provides that it is a crime:

12 If two or more persons conspire...to defraud the  
13 United States, or any agency thereof, in any manner or for any  
14 purpose, and one or more such persons do any act to effect the  
15 object of the conspiracy...

16 As I mentioned, Count Three charges all three  
17 defendants with conspiring to defraud the RRB. More detail as  
18 to the Count Three can be found in paragraph 42 of the  
19 indictment.

20 Count Four charges the defendants Marie Baran and  
21 Joseph Rutigliano with conspiring with Dr. Ajemian and others  
22 to defraud the RRB. More detail as to Count Four can be found  
23 in paragraph 45 of the indictment.

24 In order for you to find that each of the defendants  
25 guilty of the conspiracy charged in Counts Three and Four, the

D81LLES4

Charge

1 government must prove beyond a reasonable doubt each of the  
2 following three elements:

3 First, that two or more persons entered into the  
4 unlawful agreement charged in the indictment.

5 And, second, that the defendant knowingly -- the  
6 defendant you are considering knowingly and willfully became a  
7 member of the conspiracy.

8 Third, that one of the members of the conspiracy  
9 knowingly committed at least one of the overt acts charged in  
10 the indictment to further some objective of the conspiracy.

11 In order for you to find a particular defendant guilty  
12 of conspiracy to defraud the United States, the government must  
13 prove beyond a reasonable doubt each of the three elements of  
14 the first -- the first two of which are the same as they were  
15 for the conspiracy charged in Counts One and Two. That is, the  
16 first element is the existence of a conspiracy, although of  
17 course here the charged object of the conspiracy is to defraud  
18 the United States. The second element is the defendants'  
19 knowingly and willful participation in the conspiracy.

20 The third element, which is new, is that any one of  
21 the conspirators, not necessarily the defendant you are  
22 considering, but any one of the parties involved in the  
23 conspiracy knowingly committed at least one overt act, and that  
24 the overt act which you have found to have been committed was  
25 committed in furtherance of the conspiracy. You should apply

D81LLES4

Charge

1 the same instructions and definitions I've already given you  
2 when considering the first and second elements of Count Two --  
3 I'm sorry -- Counts Three and Four as well.

4 Just as with Counts One and Two conspiracies, the  
5 charge of conspiracy to defraud the government does not mean  
6 that one of the illegal objects must be to cause the government  
7 to suffer a loss of money or property as a consequence of the  
8 conspiracy. It would also be a conspiracy to defraud if one of  
9 the objects was to obstruct, interfere, impair, impede or  
10 defeat the legitimate functioning of the government through  
11 fraudulent or dishonest means. And, I understand you that the  
12 RRB is an agency of the United States under the meaning of this  
13 conspiracy statute.

14 Now, let me explain in more detail the third element,  
15 the overt act element, that applies to Counts Three and Four.  
16 Under the statute criminalizing conspiracies to defraud the  
17 United States, there has to be something more than just an  
18 agreement, some overt step or action must be taken, must have  
19 been taken by at least one of the conspirators in furtherance  
20 of the conspiracy. The government must prove beyond a  
21 reasonable doubt that -- beyond a reasonable doubt to establish  
22 the offense of conspiracy as charged in Counts Three and Four  
23 that at least one member -- one of the conspirators committed  
24 at least one overt act in furtherance of the conspiracy.

25 In other words, the overt act element is a requirement

D81LLES4

Charge

1 that the agreement went beyond the mere talking stage, the mere  
2 agreement stage. Count Three, for Count Three, a number of  
3 overt acts are alleged in the indictments in paragraph 43.  
4 Similarly, for Count Four, a number of overt acts are alleged  
5 in the indictment in paragraph 46. I will not read them to you  
6 now, but you will have the indictment with you in the jury  
7 room.

8 You need not find the defendant you are considering in  
9 this case committed the overt act. It is sufficient if you  
10 find that at least one overt act was in fact performed by at  
11 least one coconspirator, whether a defendant or another  
12 coconspirator, to further the conspiracy within the time frame  
13 of the conspiracy. It is not necessary for the government to  
14 prove that the specified overt acts alleged were committed, so  
15 long as the government proves, as I've explained, the existence  
16 of the conspiracy charged in the indictment, and that the  
17 defendant you are considering was a knowing and intentional  
18 member of the conspiracy.

19 Remember, the act of any one of the members of the  
20 conspiracy, done in furtherance of the conspiracy, becomes the  
21 act of all the other members. To be a member of the  
22 conspiracy, it is not necessary for the defendant you are  
23 considering to commit an overt act.

24 As I've already instructed you on several occasions  
25 during the course of the trial, however, in considering the

D81LLES4

Charge

1 evidence or lack of evidence against Dr. Lesniewski, you may  
2 not consider the testimony of witnesses related to statements  
3 or conduct of Dr. Ajemian or Dr. Parisi.

4 In order for the government to satisfy this element,  
5 it must prove beyond a reasonable doubt that at least one overt  
6 act was knowingly and willfully done by at least one  
7 coconspirator in furtherance of some object or purpose of the  
8 conspiracy, as charged in the indictment. In this regard, you  
9 should bear in mind that the overt act, standing alone, may be  
10 an innocent, lawful act. However, an apparently innocent act  
11 sheds its harmless character if it is a step in carrying out,  
12 promoting, aiding, or assisting the conspiratorial scheme. You  
13 are therefore instructed that the overt act does not have to be  
14 an act which in and of itself is criminal or constitutes an  
15 objective of the conspiracy.

16 You are further instructed that the overt act need not  
17 have been committed as precisely the time alleged in the  
18 indictment. It is sufficient if you are convinced beyond a  
19 reasonable doubt that it occurred at or about the time and  
20 place stated. The applicable statute of limitations for Counts  
21 Three and Four require that the overt act must have occurred  
22 after December 18, 2006.

23 Although proof of at least one overt act is necessary  
24 to prove an element of the crime charged in Count Three and  
25 Four, you need not reach unanimous agreement on which



D81LLES4

Charge

1 particular overt act was committed in furtherance of the  
2 conspiracy.

3 A conspiracy, once formed, is presumed to continue  
4 until either its objectives are accomplished or there is some  
5 affirmative act of termination by its members.

6 A defendant withdraws from a conspiracy when he or she  
7 abandons the agreement. But, since it is all too easy after  
8 the fact for a defendant to claim that he or she withdrew from  
9 the plot, the law requires the taking of some affirmative  
10 action on the part of the defendant who contends to have  
11 withdrawn from the conspiracy.

12 Simply stopping to participate in the conspiracy is  
13 not sufficient to demonstrate a withdrawal from the conspiracy.  
14 Unless a conspirator produces affirmative evidence of  
15 withdrawal, his or her participation in the conspiracy is  
16 presumed to continue until the last overt act by any of the  
17 conspirators.

18 In order to withdraw from a conspiracy, a defendant  
19 must either make a clean break of it and report his or her  
20 illegal acts to the law enforcement, or clearly explain to his  
21 or her conspirators that he or she no longer wishes to be part  
22 of the conspiracy. The burden of establishing withdrawal lies  
23 on the defendant.

24 Counts Five through Eight of the indictment charge  
25 healthcare fraud in violation of section 1347 of Title 18 of

D81LLES4

Charge

1 the United States Code. The statute reads as follows in  
2 pertinent part:

3 Whoever knowingly and willfully executes, or attempts  
4 to execute, a scheme or artifice --

5 (1) to defraud any healthcare benefit program; or

6 (2) to obtain, by means of false or fraudulent  
7 pretenses, representations, or promises, any of the money or  
8 property owned by, or under the custody of or control of, any  
9 healthcare benefit program, in connection with the delivery of  
10 or payment for healthcare benefits, items, or services, shall  
11 be guilty of a crime.

12 More detail as to the Counts Five through Eight can be  
13 found in paragraph 48 of the indictment.

14 In order to prove a defendant guilty of healthcare  
15 fraud, the government must establish beyond a reasonable doubt  
16 each of the following elements as to that defendant.

17 First, that there was a scheme to defraud or a scheme  
18 to obtain money or property by means of materially false or  
19 fraudulent pretenses, representations, or promises in  
20 connection with the delivery of or payment for healthcare  
21 benefits, items, or services, as charged in the indictment;

22 Second, that the defendant knowingly and willfully --  
23 the defendant you are considering knowingly and willfully  
24 executed or attempted to execute that scheme with intent to  
25 defraud; and

D81LLES4

Charge

1 Third, that the target of the scheme was a healthcare  
2 benefit program, as I will define that phrase for you.

3 The first element that the government must prove  
4 beyond a reasonable doubt is that there was a scheme or  
5 artifice to defraud a healthcare benefit program. I instruct  
6 you that as a matter of law, Medicare -- United Healthcare  
7 constitutes a "healthcare benefit program" as that term is used  
8 in the indictment.

9 The first element is almost self-explanatory. A  
10 "scheme or artifice" is merely a plan for the accomplishment of  
11 an object. A scheme to defraud is any plan, device, or course  
12 of action to obtain money or property by means of false or  
13 fraudulent pretenses and/or statements, which are reasonably  
14 calculated to deceive a person of average prudence. A  
15 statement or claim is fraudulent if falsely made with the  
16 intention to deceive. "Fraud" is a general term that includes  
17 all of the ways people can use false representations,  
18 suggestions, deliberate disregard of truth, or suppression of  
19 the truth, to attempt to gain an advantage over someone else.

20 Thus, a "scheme to defraud" is merely a plan to  
21 deprive another of money or property by trick, deceit,  
22 deception or swindle.

23 The deception need not be premised upon spoken or  
24 written words alone. The arrangement of the words, or the  
25 circumstances in which they're used, may convey the false or

D81LLES4

Charge

1 deceptive appearance. If there is deception, the matter in  
2 which it is accomplished is immaterial.

3 The false or fraudulent representation must relate to  
4 a material fact or matter. A matter -- a material fact is one  
5 that has a natural tendency to influence, or is capable of  
6 influencing, the decision of the decision-making body to which  
7 it was addressed.

8 In addition to proving that a statement was false or  
9 fraudulent and related to a material fact, in order to  
10 establish a scheme to defraud, the government must prove that  
11 the alleged scheme contemplated depriving United Healthcare of  
12 money or property.

13 (Continued on next page)  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

D81FLES5

Charge

1           THE COURT: Furthermore, it is not necessary that the  
2 government prove that the defendant you're considering actually  
3 realize that he gained from the scheme or that the intended  
4 victim actually suffered any loss. The scheme to defraud need  
5 not be shown by direct evidence but may be established by all  
6 of the circumstances and facts in the case.

7           If you find that the government has sustained its  
8 burden of proof that a scheme to defraud as charged did exist  
9 you next should consider the second element. That element is  
10 that the government must establish beyond a reasonable doubt  
11 that the defendant you are considering devised or participated  
12 in the scheme to defraud knowingly and willfully and with the  
13 intent to defraud. The words devise, participated, are words  
14 that you are familiar with and I don't need to spend much time  
15 defining them for you. To devise a scheme to defraud is simply  
16 to concoct or plan it. To participate in the scheme to defraud  
17 means to associate one's self with it knowingly and willfully  
18 with the intent to make it succeed. While a mere onlooker is  
19 not a participant in a scheme to defraud it's not necessary  
20 that a participant be someone who personally and visibly  
21 executes a scheme to defraud. Moreover, it is not necessary  
22 for the government to establish that the defendant you are  
23 considering originated the scheme.

24           I have already explained to you that the words  
25 "knowingly" and "willfully" mean what the words "knowingly" and

D81FLES5

Charge

1 "willfully" mean in the course of instructing you on the  
2 elements of conspiracy. They have the same meaning here. To  
3 act with intent to defraud means to act willfully and with the  
4 specific intent to deceive for the purpose of causing some  
5 financial loss to another. Intent to defraud, therefore, is a  
6 fact question for you to decide that involves a person's state  
7 of mind.

8 I have already instructed you that direct proof of  
9 knowledge or fraudulent intent is not required. The ultimate  
10 facts of a person's state of mind such as intent to defraud may  
11 be established by circumstantial evidence based on a person's  
12 outward manifestations, his or her words, conduct, acts and all  
13 the surrounding circumstances disclosed by the evidence and the  
14 rational and logical inferences that may be drawn from them.

15 What is referred to as drawing inferences from  
16 circumstantial evidence is no different from what people  
17 normally mean when they say use your common sense. Using your  
18 common sense means that when you come to decide whether the  
19 government has proved that the defendant you are considering  
20 possessed the intent to defraud you need not limit yourself to  
21 just what that defendant said, but you may also look at what  
22 the defendant did and what all the evidence -- and all of the  
23 evidence or lack of evidence.

24 I instructed you already that the success of the  
25 scheme is not an element of the crime.

D81FLES5

Charge

1           The third element that the government must establish  
2 beyond a reasonable doubt is that the target of the scheme was  
3 a health care benefit program. The phrase "health care benefit  
4 program" means any public or private plan or contract under  
5 which any medical benefit, item or services provided to any  
6 individual and includes any individual or entity who is  
7 providing any medical benefit, an item or service for which  
8 payment may be made under the plan or contract. Thus the term  
9 "health care benefit program" can include an insurance company  
10 that pays medical providers to provide medical treatment.  
11 Pursuant to an insurance contract in order to qualify as the  
12 health care benefit program the program must affect interstate  
13 commerce. This means that the program must have had some  
14 effect on the movement, transportation or flow of goods,  
15 merchandise, money and individuals between and among the  
16 states.

17           Counts Nine through Thirteen charge various defendants  
18 with the substantive crime of mail fraud in violation of  
19 Section 1341 of Title 18 of the United States Code. I will  
20 also remind you that Counts One and Two charge conspiracies  
21 that had among their objects to commit mail fraud, so you  
22 should consider the elements of mail fraud that I am about to  
23 explain to you in connection with your consideration of Counts  
24 One and Two as well.

25           The mail fraud statute prohibits the use of the mails

D81FLES5

Charge

1 or commercial interstate carriers in connection with a scheme  
2 to defraud. The statute reads in pertinent part as follows:  
3 Whoever having devised or intending to devise any scheme or  
4 artifice to defraud or for obtaining money or property by means  
5 of false or fraudulent pretenses, representations or  
6 promises for the purposes of executing such scheme or artifice  
7 or attempting to do so knowingly causes to be delivered by mail  
8 or commercial interstate carrier according to the direction  
9 thereof or at the place at which it is directed to be delivered  
10 by the person to whom it is directed to be delivered by the  
11 person to whom it is addressed any such matter or thing shall  
12 be guilty of a crime. More details as to Counts Nine through  
13 Thirteen can be found in Count 50 of the indictment.

14 In order to sustain the charge of mail fraud against  
15 the defendant you are considering the government must prove  
16 each of the following three elements beyond a reasonable doubt:  
17 First, that at or around the time alleged in the indictment  
18 there was a scheme or artifice to defraud others of money or  
19 property by false or fraudulent pretenses, representations or  
20 promises. Second, that the defendant you are considering  
21 knowingly and willfully participated in the scheme or artifice  
22 with knowledge of its fraudulent nature and with the specific  
23 intent to defraud. Third, that in the execution of that scheme  
24 that defendant used or caused the use of the mails as specified  
25 in the indictment.



D81FLES5

Charge

1           Now, the first element that the government must prove  
2 beyond a reasonable doubt is the existence of the scheme or  
3 artifice to defraud others of money or property by means of  
4 false or fraudulent pretenses, representations or promises.  
5 I've already defined these terms for you and you should rely on  
6 the instructions I gave you with respect to the first element  
7 of health care fraud.

8           The second element the government must prove beyond a  
9 reasonable doubt is that the defendant you are considering  
10 knowingly and willfully participated in the scheme or artifice  
11 to defraud with knowledge of its fraudulent nature and with  
12 specific intent to defraud. I've already defined these terms  
13 for you and you should rely on the instructions I gave you with  
14 respect to the second element of health care fraud.

15           The third element of mail fraud that the government  
16 must establish beyond a reasonable doubt is the use of the  
17 mails or commercial interstate carriers in furtherance of the  
18 fraudulent scheme. The use of the mails or commercial  
19 interstate carriers can be from one state to another or just  
20 within a state or even a single city. It doesn't matter as  
21 long as the United States mails or commercial interstate  
22 carriers were used. The mail matter does not itself have to  
23 contain a fraudulent representation or a request for money. It  
24 must, however, further or assist in carrying out the scheme in  
25 some way.

D81FLES5

Charge

1           It is not necessary for the defendant you are  
2       considering to have been directly or personally involved in the  
3       mailing as long as the mailing was reasonably foreseeable to  
4       that defendant in the execution of the scheme to defraud in  
5       which the defendant is accused of participating. In this  
6       regard it is sufficient to establish this element of a crime if  
7       the evidence justifies a finding that the defendant you are  
8       considering caused the mailing in furtherance of this scheme by  
9       somebody else. This does not mean that the defendant must  
10      specifically have authorized others to do the mailing. When a  
11      person does an act with knowledge that the use of the mails  
12      will follow in the ordinary course of business or where such  
13      use of the mails can reasonably be foreseen by that person even  
14      if not actually intended then a person causes the mails to be  
15      used.

16           With respect to this element the government must prove  
17      beyond a reasonable doubt that the scheme involved the use of  
18      the mails. However, the government does not have to prove that  
19      any particular use of the mails was made on the exact date  
20      charged in the indictment. It is sufficient if the evidence  
21      establishes beyond a reasonable doubt that the mailing was made  
22      on a date substantially similar to the date charged in the  
23      indictment.

24           Counts Fourteen through Twenty charge various  
25      defendants with substantive crimes of wire fraud in violation

D81FLES5

Charge

1 of Section 1343 of Title 18 of the United States Code. I will  
2 also remind you that Counts One and Two charge conspiracies  
3 that have among their objects to commit wire fraud, so you  
4 should consider the elements of wire fraud that I am about to  
5 explain to you in connection with your consideration of Counts  
6 One and Two as well. The wire fraud statute prohibits the use  
7 of interstate wire or radio transmissions in connection with a  
8 scheme to defraud. The statute reads in pertinent part as  
9 follows: Whoever having devised or intending to devise a  
10 scheme or artifice to defraud or for obtaining money or  
11 property by means of false or fraudulent pretenses,  
12 representations or promises transmits or causes to be  
13 transmitted by means of wire, radio or television communication  
14 in interstate or foreign commerce any writings, signs, signals,  
15 pictures or sounds for the purpose of executing such a scheme  
16 or artifice shall be guilty of a crime. More details as to  
17 Counts Fourteen to Twenty can be found in paragraph 52 of the  
18 indictment.

19 In order to sustain a charge of wire fraud against a  
20 defendant the government must prove each of the following three  
21 elements beyond a reasonable doubt: First, that there was a  
22 scheme to defraud or to obtain money or property by materially  
23 false or fraudulent pretenses, representations or promises as  
24 alleged in the indictment. Second, that the defendant you are  
25 considering willfully -- knowingly and willfully participated

D81FLES5

Charge

1 in the scheme or artifice to defraud with knowledge of its  
2 fraudulent nature and with specific intent to defraud and,  
3 third, that in execution of that scheme that defendant used or  
4 caused the use of interstate wire or radio as specified in the  
5 indictment.

6 Now, the first element the government must prove  
7 beyond a reasonable doubt is the existence of a scheme or  
8 artifice to defraud others of money or property by means of  
9 false or fraudulent pretenses, representations or promises.  
10 I've already defined these terms for you and you should rely on  
11 the instructions I gave you with respect to the first element  
12 of health care fraud. The second element the government must  
13 prove beyond a reasonable doubt is that the defendant you are  
14 considering knowingly and willfully devised or participated in  
15 the scheme or artifice to defraud with knowledge of its  
16 fraudulent nature and with specific intent to defraud. I've  
17 already defined these terms for you and you should rely on the  
18 instructions I gave you with respect to the second element of  
19 health care fraud.

20 The third element of wire fraud that the government  
21 must establish beyond a reasonable doubt is the use of an  
22 interstate or international wire or radio communication in  
23 furtherance of the fraudulent scheme. The wire or radio  
24 communication must pass between two or more states as, for  
25 example, a telephone call between New York and New Jersey or it

D81FLES5

Charge

1 must pass between the United States and a foreign country such  
2 as a telephone call between New York and London. A wire  
3 communication also includes an electronic transfer of funds  
4 between banks in different states or between a bank in the  
5 United States and a bank in a foreign country. The use of the  
6 wires need not itself be a fraudulent representation. It must,  
7 however, further or assist in the carrying out of the scheme to  
8 defraud. It is not necessary for the defendant you are  
9 considering to be directly or personally involved in the wire  
10 communication as long as the communication was reasonably  
11 foreseeable in the execution of the alleged scheme to defraud  
12 in which the defendant you are considering is accused of  
13 participating.

14 In this regard it is sufficient to establish this  
15 element of the crime if the evidence justifies a finding that  
16 the defendant you are considering caused the wires to be used  
17 by others. This does not mean that that defendant must  
18 specifically have authorized others to make the call or  
19 transfer the funds. When one does an act with knowledge that  
20 the use of the wires will follow in the ordinary course of  
21 business or where such use of the wires can reasonably be  
22 foreseen even though not actually intended, then he or she  
23 causes wires to be used.

24 With respect to the use of the wires the government  
25 must establish beyond a reasonable doubt the particular use

D81FLES5

Charge

1 charged in the indictment. The wires charged are the regular  
2 electronic payments of disability payments to annuitants. The  
3 government need not prove all of these wire transmissions as  
4 long as the government proves at least one of these  
5 transmissions for the wire fraud count you are considering. In  
6 other words, the government must prove beyond a reasonable  
7 doubt one interstate wire transmission for Count Nineteen and  
8 at least one interstate wire transmission for Count Twenty and  
9 so on. You must be unanimous as to what that wire transmission  
10 is for each count.

11 Count Twenty-One charges the defendant, Joseph  
12 Rutigliano with making a false statement in a disability  
13 recertification form filed with the RRB in violation of Section  
14 1001 of Title 18, United States Code. The statute reads as  
15 follows in pertinent part: Whoever in any matter within the  
16 jurisdiction of the executive, legislative or judicial branch  
17 of the government of the United States knowingly and willfully  
18 makes any materially false, fictitious or fraudulent statement  
19 or representation shall be guilty of a crime. More detail as  
20 to Count Twenty-One can be found in paragraph 54 of the  
21 indictment.

22 The purpose of Section 1001 is to protect the  
23 authorized functions of the various governmental departments  
24 from any type of misleading or deceptive practice or from  
25 adverse consequences that might result from such deceptive

D81FLES5

Charge

1 practices. To establish a violation of Section 1001 it is  
2 necessary for the government to prove certain elements which I  
3 will describe to you beyond a reasonable doubt. However, I  
4 want to point out now that it is not necessary for the  
5 government to prove that the government agency was in fact  
6 misled as a result of the defendant's action. It does not  
7 matter whether the agency was actually misled or even that it  
8 knew of the misleading or deceptive act should you find that  
9 the act occurred. These circumstances would not excuse or  
10 justify a concealment undertaken or a false, fictitious or  
11 fraudulent statement willfully and knowingly made about a  
12 matter within the jurisdiction of the government of the United  
13 States.

14 In order to sustain a charge of false statements  
15 against a defendant the government must prove each of the  
16 following five elements beyond a reasonable doubt: Let me go  
17 back. In order to sustain a charge of a false statement  
18 against the defendant, bear in mind in this case it's only one  
19 defendant, Mr. Rutigliano, the defendant must prove each of the  
20 following five elements beyond a reasonable doubt. First, that  
21 on or about the date specified the defendant made a statement  
22 or representation. Second, that this statement or  
23 representation was material. Third, that the statement or  
24 representation was false, fictitious or fraudulent. Fourth,  
25 the false, fictitious or fraudulent statement was made

D81FLES5

Charge

1 knowingly and willfully and, fifth, the statement or  
2 representation was made in a matter within the jurisdiction of  
3 the government of the United States or federal funds were  
4 involved.

5           The first element that the government must prove  
6 beyond a reasonable doubt is that the defendant made a  
7 statement or representation. In this regard the government  
8 need not prove that the defendant physically made or otherwise  
9 personally prepared the statement in question. It is  
10 sufficient that the defendant caused the statement charged in  
11 the indictment to have been made. Under the statute there is  
12 no distinction between written and oral statements.

13           The second element the government must prove beyond a  
14 reasonable doubt is that the facts falsified or concealed or  
15 covered up was material. A fact is material if it is capable  
16 of influencing the government's decisions or activities.  
17 However, proof of actual reliance on the statement by the  
18 government is not required.

19           The third element that the government must prove  
20 beyond a reasonable doubt is that the statement or  
21 representation was false, fictitious or fraudulent. A  
22 statement is false or fictitious if it was untrue when made and  
23 known at the time to be untrue by the person making it or  
24 causing it to be made. A statement is fraudulent if it was  
25 untrue when made and was made or caused to be made with the



D81FLES5

Charge

1 intent to deceive the government agency to which it was  
2 submitted.

3 The fourth element the government must prove beyond a  
4 reasonable doubt is that the defendant acted knowingly and  
5 willfully. I've already defined these terms for you in  
6 discussing the conspiracy charged in the case and you should  
7 rely on those definitions.

8 The fifth element that the government must prove  
9 beyond a reasonable doubt is that the statement or concealment  
10 be made or undertaken with regards to a matter within the  
11 jurisdiction of the government of the United States. I charge  
12 you that the RRB is a department of the United States  
13 government. There is no requirement that the document be  
14 actually directed to or given to the RRB. All that is  
15 necessary is that you find that it was contemplated that the  
16 document was to be utilized in a matter that was within the  
17 jurisdiction of the government of the United States or that  
18 federal funds were involved. To be within the jurisdiction of  
19 the government of the United States means that the statement  
20 must concern an authorized function of that department or  
21 agency. It is not necessary for the government to prove that  
22 the defendant had actual knowledge that the false statement was  
23 to be utilized in a matter that was within the jurisdiction of  
24 the government of the United States. It is sufficient to  
25 satisfy this element if you find that the false statement was

D81FLES5

Charge

1 made with regards to a matter within the jurisdiction of the  
2 government of the United States.

3 It is each defendant's theory of the case that he or  
4 she did not possess the requisite intent to satisfy either the  
5 conspiracy charges or the substantive charges listed in the  
6 indictment. That is, each of the defendants contends that he  
7 or she did not knowingly or willfully enter into any of the  
8 charged conspiracies and that he or she did not possess an  
9 intent to defraud anyone. Since an essential element of the  
10 crimes charged is intent to defraud it follows that good faith  
11 on the part of the defendant you are considering is a complete  
12 defense to a charge of mail fraud, wire charge or health care  
13 fraud. A defendant, however, has no burden to establish a  
14 defense of good faith. The burden is on the government to  
15 prove fraudulent intent and the consequent lack of good faith  
16 beyond a reasonable doubt. However misleading or deceptive a  
17 plan may be it is not fraudulent if it was devised or carried  
18 out in good faith. An honest belief of the truth of a  
19 representation made by a defendant is a good defense however  
20 inaccurate the statements may turn out to be.

21 However, if a defendant knew that his or her  
22 representations were false and material it is not a defense  
23 that he or she believed that the victim would recognize the  
24 falsity and decide not to rely on those statements. As a  
25 practical matter, then, in order to sustain the charge against

D81FLES5

Charge

1 the defendant you are considering the government must establish  
2 beyond a reasonable doubt that he or she knew that his or her  
3 conduct as a participant in the scheme was calculated to  
4 deceive and nonetheless he or she associated himself or herself  
5 with the alleged fraudulent scheme for the purpose of causing  
6 some loss to another.

7 To conclude on this element, if you find that the  
8 defendant you are considering was not a knowing participant in  
9 the scheme or that he or she lacked the specific intent to  
10 defraud you should find that defendant not guilty. On the  
11 other hand, if you find that the government has established  
12 beyond a reasonable doubt not only the first element, namely,  
13 the existence of the scheme to defraud, but also this second  
14 element, that the defendant you are considering was a knowing  
15 participant and acted with a specific intent to defraud and if  
16 the government also establishes a third element as to which I  
17 am about to instruct you, then you have a sufficient basis upon  
18 which to convict that defendant.

19 It is also unimportant whether a victim might have  
20 discovered the fraud had it probed further. If you find that a  
21 scheme or artifice to defraud existed, it is irrelevant whether  
22 you believe that a victim was careless, gullible or even  
23 negligent. Here the government alleges that the defendants  
24 were involved in a scheme to defraud the RRB by obtaining  
25 disability benefits for Long Island Rail Road employees by

D81FLES5

Charge

1 means of false and fraudulent applications and supporting  
2 materials. Negligence, carelessness or gullibility on the part  
3 of the victim is no defense or charge of such fraud.

4           There is another way you may evaluate the possible  
5 guilt of a defendant on Counts Twelve through Twenty even if  
6 you find the government did not satisfy its burden of proof  
7 with respect to each element of each of those substantive  
8 crimes. If in light of my instructions you find beyond a  
9 reasonable doubt that the defendant you are considering was a  
10 member of one of the conspiracies charged in Counts One through  
11 Four and thus guilty of that conspiracy count, then you may  
12 also, but you are not required to, find him or her guilty of  
13 the substantive crime charged against him or her in Counts Five  
14 through Twenty provided you find beyond a reasonable doubt each  
15 of the following elements: First, that the substantive crime  
16 charged in the count you are considering was in fact committed.  
17 Secondly, that the person or persons who did commit the crime  
18 were members of the conspiracies that existed. Third, that the  
19 substantive crime you are considering was committed pursuant to  
20 a plan and understanding you found to exist among the  
21 conspirators. Fourth, that the defendant you are considering  
22 was a member of that conspiracy at the time the substantive  
23 crime was committed and, fifth, that the defendant you are  
24 considering could have reasonably foreseen that the substantive  
25 crime might be committed by his or her co-conspirators.

D81FLES5

Charge

1           If you find all five of these elements to exist beyond  
2 a reasonable doubt then you may find the defendant you are  
3 considering guilty of the substantive crime charged against him  
4 or her, even though he or she did not personally participate in  
5 the acts constituting the crime or did not have actual  
6 knowledge of it. The reason for this rule is simply that a  
7 co-conspirator who commits a substantive crime pursuant to a  
8 conspiracy is deemed to be the agent of the other conspirators.  
9 Therefore, all of the co-conspirators must bear criminal  
10 responsibility for the commission of the substantive crimes.

11           If, however, you are not satisfied as to the existence  
12 of any of these five elements with respect to any of the  
13 charged conspiracies then you may not find the defendant you  
14 are considering guilty of the substantive crime unless the  
15 government proves beyond a reasonable doubt that the defendant  
16 personally committed or aided and abetted or caused the  
17 commission of the substantive crime charged.

18           With respect to Counts Five through Twenty, the  
19 indictment also charges the defendants with what is called  
20 aiding and abetting. The aiding and abetting statute, Section  
21 2(a) of Title 18 of the United States Code provides that  
22 whoever commits an offense against the United States or aids,  
23 abets, counsels, commands, induces or procures its commission  
24 is punishable as a principal. Under the aiding and abetting  
25 statute it is not necessary for the government to show that the

D81FLES5

Charge

1 defendant you are considering himself or herself physically  
2 committed the crime with which he or she is charged in order  
3 for you to find that defendant guilty. Thus, if you find that  
4 the government has proved beyond a reasonable doubt that a  
5 particular defendant himself or herself committed the crime  
6 charged you may under certain circumstances still find that  
7 defendant guilty of that crime as an aider or abettor if the  
8 government has proved certain elements beyond a reasonable  
9 doubt.

10 A person who aids or abets another to commit a crime  
11 is just as guilty of that offense as if he or she committed it  
12 himself or herself. Accordingly, you may find a particular  
13 person guilty of the substantive crime if you find beyond a  
14 reasonable doubt that the government has proved that another  
15 person actually committed the crime and that the defendant  
16 aided and abetted that person in the commission of the offense.  
17 As you can see, the first requirement is that another person  
18 has committed the crime charged. Obviously, no one can be  
19 convicted of aiding and abetting the criminal acts of another  
20 if no crime was committed by the other person in the first  
21 place. But if you do find that a crime was committed, then you  
22 must consider whether the defendant you are considering aided  
23 or abetted the commission of the crime. In order to aid or  
24 abet another to commit a crime it is necessary the defendant  
25 willfully and knowingly associated himself or herself in some

D81FLES5

Charge

1 way with the crime and that he or she willfully and knowingly  
2 seek some act to help make the crime succeed.

3 I have already defined the concepts of "knowingly" and  
4 "willfully" for you. You should apply those same definitions  
5 here. The mere presence of a defendant where a crime is being  
6 committed even coupled with knowledge by the defendant that a  
7 crime is being committed or the mere acquiescence by a  
8 defendant in the criminal conduct of others even with guilty  
9 knowledge is not sufficient to establish aiding and abetting.  
10 An aider and abettor must have some interest in the criminal  
11 venture. To determine whether the government has proved beyond  
12 a reasonable doubt that the defendant you are considering aided  
13 or abetted the commission of a crime with which he or she is  
14 charged ask yourselves these questions: Did he or she  
15 participate in the crime charged as something he or she wished  
16 to bring about? Did he or she associate himself or herself  
17 with the criminal venture knowingly and willfully? Did he or  
18 she seek by his or her actions to make the criminal venture  
19 succeed?

20 If the government proved beyond a reasonable doubt  
21 that he or she did all three of them, then that defendant is an  
22 aider and abettor and therefore guilty of the offense you are  
23 considering. If he or she did not, then the defendant is not  
24 an aider or abettor and the defendant is not guilty of that  
25 offense.

D81FLES5

Charge

1           The indictment in this case alleges fraud relating to  
2           disability applications filed by certain Long Island Rail Road  
3           employees to the RRB. You have heard evidence that the RRB  
4           administers disability programs under the Railroad Retirement  
5           Act. This statute provides two disability standards that you  
6           have heard described. First, there is what is known as a total  
7           and permanent disability under the applicable RRB regulations.  
8           This means that a person is unable to do any substantial  
9           gainful activity because of an medically determinable physical  
10          or mental impairment which is permanent or lasts at least one  
11          year. The second standard is what's known as an occupational  
12          disability. Under the applicable RRB regulations an  
13          occupationally disabled person must be disabled for work in his  
14          or her regular railroad occupation because of a permanent  
15          physical or mental impairment. You also heard much testimony  
16          about railroad occupations under RRB regulations to determine  
17          what the employee's regular railroad occupation is. The RRB  
18          relies on the employee's description of his or her job and in  
19          determining the demands of that job the RRB is directed to  
20          consider the applicant's own description of his or her own  
21          regular railroad occupation as well as the employer's  
22          description, as well as generic job descriptions that are  
23          maintained by the RRB.

24                I have told you the elements of each charge in the  
25                indictment. In addition to the elements I have described to



D81FLES5

Charge

1 you as to each charge the government must prove that some act  
2 in furtherance of the charge you are considering occurred in  
3 the Southern District of New York. You are instructed that the  
4 Southern District of New York includes the following counties:  
5 The Bronx, Manhattan or New York county, Dutchess, Orange  
6 Putnam, Rockland, Sullivan and Westchester County. In addition  
7 the Southern District of New York includes the water  
8 surrounding Long Island and Manhattan as well as the air space  
9 above the district or the waters in the district. It is  
10 sufficient to satisfy this element if any act in furtherance of  
11 the crime occurred within this district.

12 I should note that on this issue and this issue alone  
13 the government need not prove venue beyond a reasonable doubt,  
14 but only by mere preponderance of the evidence. Thus the  
15 government has established its venue obligations if you  
16 conclude that it is more likely than not that any act in  
17 furtherance of the crimes charged in each count occurred in the  
18 Southern District of New York. If you find that the government  
19 has failed to prove this venue requirement by a preponderance  
20 of the evidence then you must acquit the defendant you are  
21 considering of that charge because he or she has the right to  
22 be tried only in a district where venue is proper.

23 I have now outlined for you the rules of law  
24 applicable to this case and the process by which you weigh the  
25 evidence and determine the facts. The most important part of

D81FLES5

Charge

1 the case, members of the jury, is that part which you as jurors  
2 are now about to play as you deliberate on the issues of fact.  
3 I know you will try the issues that are presented to you  
4 according to the oath of office you have taken as jurors. In  
5 that oath you promised that you would well and truly try the  
6 issues in this case and render a true verdict. In a few  
7 minutes you will retire to the jury room for your  
8 deliberations.

9 In this courtroom it is customary for Juror No. 1, the  
10 juror seated closest to the judge's bench, to be the  
11 foreperson. In this case it is Ms. Shirley Howe. So the  
12 deliberations may proceed in an orderly fashion you must have a  
13 foreperson, but of course her vote is entitled to no greater  
14 weight than that of any other juror. The foreperson has no  
15 greater voice or authority than any other juror. The  
16 foreperson will send out any notes and when the jury has  
17 reached their verdict she will notify the marshal that the jury  
18 has reached a verdict.

19 The government to prevail must prove the essential  
20 elements by the required degree of proof as already explained  
21 in these instructions. If it succeeds, your verdict should be  
22 guilty. If it fails it should be not guilty. To report a  
23 verdict it must be unanimous. Your function is to weigh the  
24 evidence in the case and to determine whether or not the  
25 defendant you are considering is guilty solely upon the basis

D81FLES5

Charge

1 of such evidence.

2 Each juror is entitled to his or her opinion. Each  
3 should, however, exchange views with his or her fellow jurors.  
4 That is the very purpose of jury deliberations, to discuss  
5 evidence, to listen to the arguments of fellow jurors, to  
6 present your individual views, to consult with one another and  
7 to reach an agreement based solely and wholly on the evidence  
8 if you can do so without violence to your own individual  
9 judgment. Each of you must decide the case for yourself after  
10 consideration with your fellow jurors of the evidence in the  
11 case but in the course of your deliberations you should not  
12 hesitate to reexamine your own views and change an opinion if  
13 you are convinced it is erroneous. However, if after careful  
14 consideration of all of the evidence and the arguments of your  
15 fellow jurors you entertain a conscientious view that differs  
16 from the others you are not to yield your conviction simply  
17 because you are outnumbered. Your final vote must reflect your  
18 conscientious conviction as to the issues, as to how the issues  
19 should be decided.

20 Your verdict, whether guilty or not guilty must be  
21 unanimous. When you are in the jury room listen to each other  
22 and discuss the evidence and issues in the case among  
23 yourselves. It is the duty of each of you to consult with one  
24 another and to deliberate with a view to reaching an agreement  
25 on the verdict if you can do so without violating your

D81FLES5

Charge

1 individual judgment and your conscience. Each juror should be  
2 heard. No one juror should hold the center stage in the jury  
3 room and no one juror should control or monopolize  
4 deliberations. To reach a verdict all of you must agree but  
5 you must not surrender your conviction for the mere purpose of  
6 returning a verdict solely because of the opinion of the other  
7 jurors.

8 I will give you a verdict form to be filled out by  
9 you, the jury. No inference is to be drawn from the way the  
10 verdict sheet is worded as to what the answers should be.  
11 Questions are not to be taken as any indication that I have an  
12 opinion, any opinion as to how this should be answered. Before  
13 the jury attempts to answer any question you are to read the  
14 entire verdict sheet and make sure that everybody understands  
15 each question. Before you answer the questions you should  
16 deliberate in the jury room and discuss the evidence that  
17 relates to the questions you must answer. When you have  
18 considered the questions thoroughly and the evidence that  
19 relates to these questions record your answers on the verdict  
20 sheet I will give you. Remember, all answers must be agreed  
21 upon by all of you.

22 Now, ladies and gentlemen, you are about to go into  
23 the jury room to begin your deliberations. All the exhibits  
24 will be given to you at the start of your deliberations. If  
25 you want any testimony read back to you, you may also request

D81FLES5

Charge

1 that. Please remember that while we do have a daily written  
2 transcript available if you ask for testimony the reporter must  
3 search through his or her notes and the lawyers must agree on  
4 what portions of the testimony may be called for and if they  
5 disagree I must resolve those disagreements. That can be time  
6 consuming, so please try to be as specific as you possibly can  
7 in requesting portions of testimony if you do so. Your request  
8 for testimony, in fact, any communication with the Court should  
9 be made to me in writing signed by your foreperson and given to  
10 one of the marshals. In any event do not tell me or anyone  
11 else how the jury stands on any issue until a verdict is  
12 reached. When you make your request, the foreperson signs it,  
13 please indicate the date and the time on the note. I will  
14 provide you with form communication sheets on which the  
15 foreperson should make all communications with the Court.

16 As I indicated earlier, I will be sending a copy of  
17 the indictment to the jury room for you to have during your  
18 deliberations. You may read it to read the crimes which the  
19 defendants are charged with committing. You are reminded,  
20 however, that an indictment is merely an accusation and is not  
21 to be used by you for any proof of the conduct charged.

22 Finally, let me say this, not because I think it is  
23 necessary, but because it is the custom in this courtroom. You  
24 should treat each other with courtesy and respect during your  
25 deliberations. After you have reached the verdict, your

D81FLES5

Charge

1 foreperson will fill in the verdict sheet that will be given to  
2 you, sign and date it and advise the marshal outside of your  
3 door that you are ready to return to the courtroom. If you are  
4 divided, do not report on how the whole stands and if have  
5 reached a verdict do not report what it is until you are asked  
6 in open court.

7 I will stress you should be in agreement with the  
8 verdict announced in open court. Once your verdict is  
9 announced by the foreperson in open court and officially  
10 recorded, it cannot be revoked. Remember that verdict must be  
11 rendered with favor, fear, sympathy or prejudice.

12 I thank you for your attention and attentiveness.

13 Counsel, please approach.

14 (Continued on next page)  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

D81FLES5

Charge

1 (At the side bar)

2 THE COURT: All right, I'm trying to sort out one  
3 place where I made a reference to a third element and it was  
4 not clear what the third element referred to because I  
5 indicated which I am about to describe but we never got back to  
6 the third element.

7 MR. DRATEL: It was right before negligence of the  
8 victim, I believe.

9 MR. WEDDLE: I think that was the good faith  
10 instruction, but I think that originally was part of one of the  
11 substantive crimes, and so I think you could just tell the jury  
12 that when you were talking about good faith you said you were  
13 going to talk about the third element to be described but what  
14 you meant was that the third element had already been described  
15 of the substantive charge.

16 THE COURT: That's my understanding, so we're trying  
17 to find a way of phrasing so that they don't get confused and  
18 think that somehow something was left out.

19 All right, now, a couple of things. One, are there  
20 any further objections to the instructions as read, any further  
21 objections beyond what you've already reserved and expressed?

22 MR. RYAN: The record should show it took two hours.  
23 A record for you.

24 THE COURT: I have a better on-time record than the  
25 Long Island Rail Road.

D81FLES5

Charge

1 MR. DRATEL: I just want to particularize that when  
2 the Court defined total and permanent disability and  
3 occupational disability, did not include a statement that this  
4 case does not charge total and permanent disability, so that's  
5 one. I had mentioned that before, but I just wanted to  
6 particularize it, that that's not what's charged here. Thanks.

7 MR. WEDDLE: He's just preserving his objection.

8 THE COURT: Mr. Weddle?

9 MR. WEDDLE: We already had this discussion. I  
10 understood Mr. Dratel to be preserving his objection.

11 MR. DRATEL: Yes, yes.

12 THE COURT: I deliberately phrased it in a way that  
13 provided for the jury to be informed of what those definitions  
14 were without getting into what is or is not charged because  
15 there's some lack of clarity on that issue. Not lack of  
16 clarity. There is a dispute. Okay.

17 Now, coming back to the alternates, Mr. Durkin, I  
18 indicated that I would give you an opportunity to be heard,  
19 although not necessarily to be listened to.

20 MR. DURKIN: Judge, you said you were going to file  
21 something that your clerk had.

22 THE COURT: Yes.

23 MR. DURKIN: I haven't seen that.

24 THE DEPUTY CLERK: Yesterday I was observing Juror 11,  
25 Mr. Mark. There were a few occasions between 12 and 1:00 p.m.



D81FLES5

Charge

1 specifically when he appeared to nod off and then a couple of  
2 occasions after 3:00, between 3 and 3:30. On some occasions it  
3 was difficult to tell if he was writing, but sometimes he was  
4 out.

5 THE COURT: All right.

6 MR. DURKIN: Judge, the only -- and I obviously don't  
7 want to quarrel with your clerk and I don't want to quarrel  
8 with you. I don't want to quarrel with anyone --

9 THE COURT: I told Connor to be prepared to take the  
10 stand under oath and be cross-examined.

11 MR. DURKIN: I am too tired. I observed him yesterday  
12 quite a bit and I did observe that he took a lot of notes  
13 throughout the closing argument. I found him to be very  
14 engaged the entire time I was talking to the jury. The times I  
15 was watching him I found him to be very engaged. I also want  
16 the record to reflect that this jury has been seemingly getting  
17 along famously well. There was a whole outburst, everybody in  
18 the courtroom recognized just two days ago where they were all  
19 laughing hysterically and I think your Honor made a note, made  
20 a comment on the record that maybe you'll let us in on what the  
21 joke was. There doesn't appear to be any hostility from  
22 anything he's done and I thought that was one of your concerns.  
23 And I'm just -- we didn't use all our challenges, that's the  
24 best I can tell you and he was an important juror to us, and  
25 I'm concerned.

D81FLES5

Charge

1 I know you said that it hasn't affected your judgment,  
2 but I'm concerned that if there was an issue reported by  
3 somebody, and it's my understanding that it was the lady that  
4 is of Cuban descent that seemed offended by his comment about  
5 Castro, I have a lot of concerns about that. There's just  
6 something that doesn't sit well with me over that issue, and it  
7 doesn't appear to be affecting the way they get along now. I  
8 mean, right now as I'm looking over your shoulder he's actively  
9 engaged in a conversation with the woman next to him, he was  
10 speaking to the woman in front of him. They all seem to be  
11 getting along well, and I just think we're losing one of our --  
12 it affected our jury selection.

13 THE COURT: Thank you, Mr. Durkin. A couple of  
14 things. One is you keep coming back to this issue of the  
15 comment that was made to one of the jurors concerning  
16 Mr. Castro. That is not what triggered my concern. My clerk  
17 came to me within a couple of days after the start of the trial  
18 and mentioned to me that he observed Mr. Mark nodding off, not  
19 attempting -- long before we started hearing complaints from  
20 jurors about Mr. Marks' distracted or sometimes odd behavior.  
21 So my concern about his inattentiveness predated this comment  
22 that you continue to raise, and that comment is not the only  
23 thing that members of the jury complained about Mr. Mark. I  
24 drew it to your attention and told you I was going to continue  
25 at random to look to see whether he was attentive. A couple of

D81FLES5

Charge

1 days ago I brought to your attention again times that he was  
2 nodding off --

3 MR. DURKIN: Judge, I understand.

4 THE COURT: Also at times he was crouching, at least  
5 one time I noted he was for five minutes crouching with a  
6 posture that was clearly not paying attention and disturbing  
7 his neighbors.

8 MR. DURKIN: Judge, we can respectfully disagree. I  
9 get it.

10 THE COURT: You created your record and I have mine.

11 MR. DURKIN: You have the robe.

12 MS. FRIEDLANDER: Your Honor, for what it's worth, I  
13 observed him sleeping several times during the day yesterday  
14 and we have concerns about that as well.

15 THE COURT: All right, I am going to swear the marshal  
16 and send them into the jury room and have them tell us what the  
17 schedule is going to be for today and tomorrow. We need to get  
18 the exhibits to them. Have the parties pulled together all the  
19 exhibits?

20 MR. WEDDLE: I have had people working on it all  
21 afternoon. I have to check with them and see how they've done.  
22 They probably have them all organized in a trial cart.

23 MR. RYAN: Is it helpful, since it's near 5:00, that  
24 we adjourn?

25 THE COURT: Thank you, Mr. Ryan. You read my mind.

D81FLES5

Charge

1 I'm going to suggest to them that they adjourn because we need  
2 time to pull the massive number of exhibits together and they  
3 won't be ready until tomorrow morning.

4 MR. DRATEL: Judge, I hope by tomorrow morning we'll  
5 have the new redacted indictment that removes Mr. Gagliano as a  
6 defendant. Judge, one question, do you have a particular time  
7 in mind that you're going to take lunch tomorrow?

8 THE COURT: No.

9 MR. DRATEL: You're going to leave it up to hem?

10 THE COURT: Entirely up to them. We provide them  
11 lunch and they decide when -- the decision is entirely theirs.

12 MR. DRATEL: When will we learn? I'm just asking  
13 because I have someone coming into town tomorrow. If I can  
14 meet them for lunch -- I can have them meet me here.

15 THE COURT: I will ask them to let us know and if they  
16 can, they can. All right, thank you.

17 (Continued on next page)

18  
19  
20  
21  
22  
23  
24  
25

D81FLES5

Charge

(In open court; jury present)

THE COURT: Let me come back to one matter that requires clarification. There was one point when I was describing the question of good faith in which at the end of that instruction I made reference to the fact that the government must also establish a third element and I said "as to which I am about to instruct you." And then those of you who are -- or I should say all of you who are clearly paying attention lit up at that point and noticed that I didn't come back to that third element. The reason is that at some point we made some revisions in the instruction and the reference to that third element was actually told and was the good faith instruction that I had already given. So take that into account when you consider this, that the third element to which I made reference there is actually that good faith instruction that I had already given.

Now, I will ask the clerk to swear in the marshal.

(Marshal sworn)

THE COURT: All right. And next. I mentioned to you that you were going to have a copy of the indictment and a copy of all of the exhibits available to you in the jury room. As you are undoubtedly aware, the exhibits in the case were voluminous and it will require a lot more time than we have been able to allocate this afternoon to put them all together. There are people working as we speak in trying to sort it all

D81FLES5

Charge

1 out and have it all ready.

2 What I am going to suggest is that we adjourn, or that  
3 you adjourn at this point and begin your deliberations tomorrow  
4 at 9:30 to give us time to have all the exhibits prepared and  
5 ready for you to begin immediately. Now, I am suggesting  
6 tomorrow at 9:30 again in order to give us a little time to  
7 prepare all the materials. Thereafter the schedule for your  
8 deliberations is going to be entirely your own and if you know  
9 roughly when you're going to be adjourning for a day or if you  
10 are going to be adjourning for lunch break at a particular time  
11 let us know so that at the end of the day we can call you into  
12 the courtroom and give you the parting instructions for the  
13 day.

14 One perk of being a juror in this court is that we  
15 provide you with lunch so that sometime in the morning my clerk  
16 will hand you a menu for ordering and we will attempt to have  
17 the lunch delivered to you at the time that you ask to have it  
18 available.

19 So I say good night and warn you again not to discuss  
20 the case among yourselves or with anyone on the outside or have  
21 any contact with anyone related to the case. In the morning  
22 when you come in do not go into the courtroom. Go directly  
23 into the jury room where the marshal is now going to escort you  
24 and do not begin any deliberations until all of you are  
25 present, and that will hold for any day in which you are

D81FLES5

Charge

1 deliberating. Again, thank you for your attentiveness and we  
2 will see you tomorrow.

3 I'm sorry, I'm sorry, one other very important matter.  
4 Please sit for just one more moment. I indicated to you at the  
5 start of the trial that there were two alternates and that I  
6 would inform you who the alternates were after the Court's  
7 instruction. The two alternates are Ms. Charity and Mr. Mark.  
8 You are excused. We thank you for your participation in the  
9 trial up to this point. I know that for an alternate it is  
10 always disappointing to come to this point and have to be  
11 excused, but nonetheless the service that you have rendered  
12 even as an alternate is of great value to the Court and to the  
13 parties, so I thank you again. I ask that you pick up your  
14 belongings and leave through the jury room and then the other  
15 jurors will follow. Thank you again, Mr. Mark and Ms. Charity.

16 (Jurors excused)

17 (Adjourned pending verdict)